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IN THE

# Supreme Court of the United States

October Term

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Number 453

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THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

*Appellants,*

vs.

WABASH RAILROAD COMPANY, ILLINOIS CENTRAL RAILROAD COMPANY AND ILLINOIS TERMINAL RAILROAD COMPANY,

*Appellees.*

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ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS

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## BRIEF FOR APPELLEES

LOUIS H. STRASSER,
WILLIAM B. BROWDER,
ELMER A. SMITH,
Attorneys for Appellees.

State Law Printing Company, 173 W. Madison St., Chicago—FRAnklin 5591

# INDEX


| | PAGE |
|---|---|
| OPINIONS BELOW | 1 |
| JURISDICTION | 2 |
| STATUTES INVOLVED | 2 |
| QUESTIONS PRESENTED | 2 |
| STATEMENT | 4 |
| SUMMARY OF ARGUMENT | 16 |
| ARGUMENT | 21 |
| I. The Commission failed to apply the statutory standards which govern its action and which determine the rights of parties before it | 21 |
| The Commission has proceeded throughout all this litigation as if Sections 2 and 3 were non-existent, in the face of the fact that issues were raised under these sections. Appellants now concede that the Commission's order has resulted in an inequality in treatment | 21 |
| II. The Commission failed and refused to apply the tests which it has laid down whereby it may be determined whether a particular service is within the scope of the railroad's legal obligation | 44 |
| III. The Commission's order is arbitrary | 50 |
| An admitted inequality in treatment existing for a period of six years cannot be said to be a temporary inequality | 50 |
| IV. The Commission recognized the justice of the lower court's opinion when it instituted an investigation respecting the switching services at the competing plants specifically named by that court | 57 |
| V. The lower court recognized that it is the function of the Commission to determine administrative questions. The court left those questions to be determined by the Commission in accordance with the statutory standards | 60 |
| VI. Only when the statutory standards have been applied can the question be reached whether the findings are supported by evidence | 68 |
| Certain subsidiary findings of the Commission are not supported by facts more particularly stated in the report, are without support in the evidence, and are contrary to the evidence | 68 |
| VII. The record before the lower court includes all the testimony offered before the Commission at the hearings involving switching service at the Staley Company's plant | 75 |
| The Commission in its report of May 6, 1941 in the case at bar makes no mention of any facts other than those contained in that record | 75 |
| CONCLUSIONS | 78 |

PAGE

APPENDIX I—Statutes involved ..... 81

APPENDIX II—Table of decisions dealing with allowances or terminal services at plants, issued by the Interstate Commerce Commission since May 14, 1935 ..... 87

## CITATIONS.

CASES:

A. E. Staley Mfg. Co. Terminal Allowance, 215 I. C. C. 656 ..... 5, 7, 8, 9, 10, 22, 51, 77, 79

A. E. Staley Mfg. Co. Terminal Allowance, 245 I. C. C. 383 ..... 1, 15

Alan Wood Iron & Steel Co. v. Pennsylvania R. R. Co. et al., 22 I. C. C. 540 ..... 31, 32

Allegheny Steel Co. Terminal Allowance, 209 I. C. C. 273 ..... 28, 34

Allegheny Steel Co. v. Dir. Gen., 60 I. C. C. 575 ..... 33

American Express Co. v. Caldwell, 244 U. S. 617 ..... 23

American Sheet & Tin Plate Co. Terminal Allowance, 209 I. C. C. 719 ..... 28

Associated Jobbers of Los Angeles v. A. T. & S. F. Ry. Co., 18 I. C. C. 310 ..... 34

Atchison, T. & S. F. Ry. Co. v. United States, 284 U. S. 248 ..... 39

Baltimore & Ohio R. R. Co. v. United States, 306 U. S. 507 ..... 74

Board of Trade of City of Chicago v. A. T. & S. F. Ry. Co., 29 I. C. C. 438 ..... 72

Boston Wool Trade Assn. v. Dir. Gen., 78 I. C. C. 341 ..... 72

Car Spotting Charges, 34 I. C. C. 609 ..... 34, 47

California Walnut Growers' Assn. v. A. & R. R. R. Co., 50 I. C. C. 558 ..... 72

Carey Mfg. Co. v. Dir. Gen., 59 I. C. C. 640 ..... 31, 32

Celotex Co. Terminal Allowances, 245 I. C. C. 105 ..... 46

Central Railroad Co. v. United States, 257 U. S. 247 ..... 65

Chicago Board of Trade v. I. C. R. R. Co., 26 I. C. C. 545 ..... 23

City of Yonkers v. United States, decided Jan. 3, 1944 ..... 67

Class Rates Between Stations in Louisiana, 33 I. C. C. 302 ..... 23

Crane Co. Terminal Services, 210 I. C. C. 210 ..... 42

Donner Steel Co. v. D. L. & W. R. R. Co., 57 I. C. C. 745 ..... 31

Eastern Central Motor Carriers Assn. v. United States, decided Feb. 7, 1944 ..... 43, 67

Eastern Class Rate Investigation, 164 I. C. C. 314 ..... 38

Emergency Freight Charges, 1935, 208 I. C. C. 4 ..... 38

Empire Steel & Iron Co. v. Dir. Gen. et al., 56 I. C. C. 158 ..... 31

Fifteen Per Cent Case, 1931, 178 I. C. C. 539 ..... 38

Fifteen Per Cent Case, 1937-1938, 226 I. C. C. 41 ..... 38

Florida v. United States, 282 U. S. 194 ..... 70

Fork Mountain Coal Co. v. C. N. O. & T. P. Ry. Co., 206 I. C. C. 106 ..... 37

Gallagher v. Pennsylvania R. R. Co., 160 I. C. C. 563 ..... 74

General Commodity Rate Increases, 1937, 223 I. C. C. 657 ..... 38

General Petroleum Investigation, 171 I. C. C. 286 ..... 39

General Rate Level Investigation, 1933, 195 I. C. C. 5 ..... 38

Grain and Grain Products Within Western District, 164 I. C. C. 619, 205 I. C. C. 301, 229 I. C. C. 9 ..... 39

PAGE

Gray v. Powell, 314 U. S. 402 ..... 80
Increased Railway Rates, Fares, and Charges, 1942, 248 I. C. C. 545, 255 I. C. C. 357 ..... 38
Inland Steel Co. v. United States, 23 Fed. Supp. 291 ..... 42
Inter. Com. Com. v. B. & O. R. R. Co., 145 U. S. 263 ..... 23
Inter. Com. Com. v. C. R. I. & P. Ry. Co., 218 U. S. 88 ..... 25, 39
Jackson Iron & Steel Co. v. Dir. Gen., 91 I. C. C. 201 ..... 31
Los Angeles Switching Case, 234 U. S. 294 ..... 34
Memphis Freight Bureau v. St. L. S. W. R. Co., 18 I. C. C. 67 ..... 37
Merchants' Warehouse Co. v. United States, 283 U. S. 501 ..... 74
Mississippi Valley Barge Line Co. v. United States, 292 U. S. 282 78
National Malleable Castings Co. v. P. & L. E. R. R. Co., et al., 51 I. C. C. 537 ..... 31
New Haven R. R. Co. v. Inter. Com. Com., 200 U. S. 361 ..... 23
Pittsburgh Plate Glass Co. Terminal Allowance, 209 I. C. C. 467, 210 I. C. C. 527 ..... 28
Propriety of Operating Practices New York Warehousing, 198 I. C. C. 134, 216 I. C. C. 291 ..... 74
Propriety of Operating Practices—Terminal Services, 209 I. C. C. 11 ..... 4, 9, 34, 66
Red River Lumber Co. Terminal Allowances, 256 I. C. C. 379 ..... 46
Riter-Conley Mfg. Co. v. Dir. Gen., 58 I. C. C. 327 ..... 31
Snoqualmie Falls Lumber Co. Terminal Allowances, 245 I. C. C. 112 ..... 46
Southern Class Rate Investigation, 100 I. C. C. 513 ..... 38
Stuarts Draft Milling Co. v. S. Ry. Co., 31 I. C. C. 623 ..... 37
Studebaker Corp. Terminal Allowance, 210 I. C. C. 137 ..... 45
Texas & Pacific Ry. Co. v. United States, 289 U. S. 627 ..... 65
The Excelsior and Flax Tow Cases, 36 I. C. C. 349 ..... 23
Tovrea & Co. v. Dir. Gen., 81 I. C. C. 583 ..... 37
Union Stock Yard Co. v. United States, 308 U. S. 213 ..... 53
United States Leather Co. v. S. Ry. Co., 21 I. C. C. 323 ..... 37
United States v. American Sheet & Tin Plate Co., 301 U. S. 402 ..... 28, 34, 42, 62, 66, 69, 75
United States v. C. M. St. P. & P. R. R. Co., 294 U. S. 499 ..... 41, 70, 80
United States v. Carolina Freight Carriers Corp., 315 U. S. 475 ..... 67, 68, 80
United States v. Pan-American Petroleum Corp., 304 U. S. 156 ..... 62, 66, 69
United States P. & F. Co. v. Dir. Gen., 57 I. C. C. 677 ..... 45, 48
Wasatch Coal Co. v. Dir. Gen., 68 I. C. C. 118 ..... 37
Weirton Steel Co. Terminal Allowance, 209 I. C. C. 445 ..... 28, 42
West Leechburg Steel Co. Terminal Allowance, 210 I. C. C. 213 ..... 28
Western Trunk Line Class Rates, 164 I. C. C. 1 ..... 38
Westport Stone Co. v. C. C. C. & St. L. Ry. Co., 48 I. C. C. 637 ..... 31

STATUTE:

Interstate Commerce Act, February 4, 1887, c. 104, 24 Stat. 379, as amended:

Sec. 1. ..... 16, 22, 23, 25, 31, 42, 74
2. ..... 6, 8, 16, 18, 19, 20, 21, 22, 23, 24, 25, 26, 31, 32, 47, 59, 61, 62, 67, 74

PAGE

3. ..... 6, 8, 16, 18, 19, 20
21, 22, 23, 24, 25, 26, 31, 32, 47, 59, 61, 62, 67, 72, 74

6. ..... 54, 55, 74

Letter dated Nov. 17, 1943 from Mr. Commissioner Splawn to Senator Burton K. Wheeler, regarding Senate Bill 1492 ..... 46

13. ..... 26, 27, 33

15. ..... 5, 26, 27, 33

MISCELLANEOUS:

57th Annual Report of the Interstate Commerce Commission, November 1, 1943 ..... 19, 58

Rule 68 of General Rules of Practice of the Interstate Commerce Commission, effective Sept. 15, 1942 ..... 38

Interstate Commerce Commission Acts Annotated, Sec. 1(5), Note 521, and Sec. 1(16), Notes 666, 671 ..... 22

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ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS

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## BRIEF FOR APPELLEES

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### Opinions Below.

The opinion of the specially constituted District Court (R. 134-139) is reported in 51 F. Supp. 141. The report of the Interstate Commerce Commission (R. 17-46) appears in 245 I. C. C. 383.

## Jurisdiction.

The final decree of the District Court was entered on July 14, 1943 (R. 143-144). The petition for appeal was filed on August 26, 1943 (R. 150) and was allowed on the same day (R. 153). The Court's jurisdiction rests upon the Urgent Deficiencies Act of October 22, 1913 (c. 32, 38 Stat. 208, 220, 28 U. S. C., sec. 47a), and Section 238 of the Judicial Code as amended by the Act of February 13, 1925 (c. 229, 43 Stat. 936, 938, par. (4), 28 U. S. C. Sec. 345). Probable jurisdiction was noted on November 22, 1943 (R. 891).

## Statutes Involved.

The pertinent provisions of the Interstate Commerce Act are set forth in Appendix I (Sections 1(5)(a), 1(6), 2, 3(1), 6(7), 13(2), 15(1), and 15(13).

## Questions Presented.

The ultimate question presented is whether the Commission's order of May 6, 1941 (R. 46) is a valid and a lawful order. This order required appellees to cancel on or before June 20, 1941, certain tariff schedules filed by them on November 10, 1939, in which they proposed to cancel the charge of $2.50 per loaded car then being made for placing cars at points of loading or unloading within the plant area of the A. E. Staley Manufacturing Company at Decatur, Illinois. The proposed cancellation was suspended by the Commission in *Investigation and Suspension Docket No. 4736, Switching Charges at Decatur, Ill.*, in which the Commission's order of May 6, 1941, was entered.

The specially constituted District Court in its opinion of June 10, 1943 (R. 134-139), held that the order of May 6, 1941, was unlawful. It set aside and annulled the order in its final decree of July 14, 1943 (R. 143-144).

The Court, following a petition filed by the defendants (R. 145-148), entered an order on August 24, 1943 (R. 149-150) staying the injunction granted by the decree pending an appeal to and decision by the Supreme Court.

Subordinate questions presented are:

1. Whether the Commission properly construed and applied the standards laid down in the Interstate Commerce Act which govern its action and by which the rights of parties before the Commission are determined.

2. Whether the Commission applied the tests which it has laid down whereby it may be determined whether a particular service is within the scope of the railroad's legal obligation.

3. Whether the Commission's action was arbitrary.

4. Whether the Commission recognized the fundamental justice of the lower court's opinion when the Commission instituted an investigation respecting the switching services being performed at competing plants at Decatur and Chicago named by the lower court in its opinion.

5. Whether certain findings and conclusions in the Commission's report are supported by facts more particularly set forth in that report and by the evidence.

6. Whether the lower court recognized that the determination of administrative questions is confided to the Commission, and whether the court left those questions to be determined by the Commission, but in accordance with the statutory standards which govern the Commission's action.

## STATEMENT.

The Commission by its order of July 6, 1931 in *Ex Parte 104,* instituted an investigation on its own motion concerning the practices of railroads which affected operating revenues or expenses. Part II of this investigation dealt with the terminal services of Class I carriers.* (R. 80). The Commission, following extended hearings dealing with the terminal services at particular industries, issued its report on May 14, 1935 in this proceeding (*Propriety of Operating Practices—Terminal Services,* 209 I. C. C. 11), in which it announced certain principles respecting the payment of terminal allowances by railroads to industries for performing switching services at their plants, or the performance of such services by the railroads themselves.

Among the industrial plants, the switching services at which were investigated by the Commission, was the plant of the A. E. Staley Manufacturing Company at Decatur, Illinois. The record before this Court includes the testimony taken by the Commission in 1931 and 1932 in the course of its investigation which related to the terminal services at the Staley plant (R. 164-241).

The Staley Company began operations in Decatur in March 1912, at which time the Staley plant was actually switched by the Wabash Railroad and the Baltimore & Ohio Railroad with their own engines (R. 373). Other railroads reaching Decatur, like the Illinois Central, absorbed the switching charge of the Wabash and the Baltimore & Ohio (R. 373).

* Class I carriers are those having revenues of more than $1,000,000 annually.

In 1922 the Wabash and the Baltimore & Ohio ceased to perform the switching services at the Staley plant. The Staley Company at that time placed cars at the various locations within its plant with its own engines and received for that service a terminal allowance (R. 373), under Section 15 (13) of the Interstate Commerce Act.

In its 55th Supplemental Report in *Ex Parte 104, Part II, A. E. Staley Manufacturing Co. Terminal Allowance,* decided May 22, 1936, 215 I. C. C. 656, the Commission held that the transportation services for which the railroads were compensated in their line-haul rates began and ended at certain interchange tracks described in the report. The Commission held that the payment of an allowance to the Staley Company for services performed beyond those tracks on interstate shipments was unlawful.

The Commission's order of May 22, 1936 was postponed from time to time until June 15, 1937 (R. 19). But all allowances made to the Staley Company were discontinued on or about June 23, 1936, on which date the Staley Company ceased to perform switching services (R. 19, 374). Since that date all switching within the plant of the Staley Company has been performed by the Wabash Railroad (R. 19).

The Commission's order of May 22, 1936 in *A. E. Staley Manufacturing Co. Terminal Allowance,* 215 I. C. C. 656, required by its terms that the railroad companies discontinue paying any allowance to the Staley Company. But the Commission had found in its report that the transportation service for which the railroads were compensated in their line-haul rates began and ended at the interchange tracks described in the report. The railroads felt impelled by these findings (R. 376) to establish a charge of $2.27 per car against the Staley

Company for the services beyond the interchange tracks. The tariffs providing for such a charge on interstate shipments took effect on November 15, 1937.* This charge was later increased to $2.50 per car (R. 20, 375).

At the time the railroads proposed to establish this charge of $2.27 per car against the Staley Company, that company filed a petition with the Commission protesting against the charge and seeking a suspension of the tariff naming the charge. (Suspension Petition of October 27, 1937, Appendix B to intervention of the A. E. Staley Manufacturing Company, R. 85, 104-116). This Petition stated that the application of such a charge would create undue prejudice and unjust discrimination against the Staley Company and its traffic, and unjust preference of numerous competitors of the Staley Company in violation of Sections 2 and 3 (R. 106). The Commission, however, declined to suspend the tariff, and the charge of $2.27 took effect on November 15, 1937.

Appellees, at the time they filed tariffs with the Interstate Commission providing for this spotting charge of $2.27 per car, filed with the Illinois Commerce Commission tariffs naming the same charge applicable to Illinois intrastate shipments. The Illinois Commission found, following a hearing (report of July 26, 1938, R. 867-878), that generally the line-haul rates in Illinois and throughout the country include terminal services at points of origin and destination, and that whenever an exception is made, such exception is grounded on the fact that the railroad is prevented from performing an uninterrupted service at points of loading and unloading because of some action or disability on the part of the industry.

The Illinois Commission further found that no such

* A charge of $1.87 per car was collected by the railroads for performing switching services during the period from June 15 to November 14, 1937 (R. 19, 374).

action or disability of the Staley Company interrupted the movement of cars in or out of loading and unloading points; that no charge is proposed to be established on any traffic moving to and from Decatur except the traffic moving to and from the Staley plant, and that no similar charge is proposed by the railroads at any other point in Illinois. The Illinois Commission held that the assessment of such a charge would result in unjust and unreasonable rates and would subject the Staley Company to discrimination. Tariffs proposing such a charge were required to be cancelled (R. 877).*

The Interstate Commission in its report of May 6, 1941 (R. 20) points out that on June 16, 1936, or a little more than three weeks after the decision of May 22, 1936 in *A. E. Staley Mfg. Co. Terminal Allowance,* 215 I. C. C. 656, the Staley Company petitioned the Commission to reopen the proceeding for further hearing on the ground that it contemplated discontinuing the service of performing itself the switching in its own plant, with a view of creating a new arrangement under which it would expect the railroads to spot the cars for loading and unloading without charge to the industry. The Commission denied this petition on November 9, 1936 (R. 20).

On May 29, 1937 the Staley Company filed another petition with the Commission asking that the proceeding be reopened for reconsideration or rehearing. The Commission denied this petition on June 8, 1937 (R. 20).

The Staley Company, assuming that the railroads would refuse to switch its plant, filed a bill in the United

* The Interstate Commission in its report of May 6, 1941 in the case at bar, contented itself with stating that the services involved in the spotting of intrastate shipments at the Staley plant are similar to those required in the spotting of interstate shipments, and that the State authority prohibits the collection of charges for spotting intrastate shipments. This, so the Interstate Commission said, raises the question of discrimination between interstate and intrastate commerce which is not in issue.

States District Court at Springfield for mandamus on June 11, 1937, just before the effective date of the Commission's order in *A. E. Staley Mfg. Co. Terminal Allowance*, 215 I. C. C. 656. The railroads continued to switch the plant. But at a hearing in the proceeding counsel for the Staley Company said to the court that unjust discrimination and undue prejudice existed against the Staley Company. Counsel for the Commission took the position that the Commission had exclusive jurisdiction to deal with such questions. He was asked by the court how long before the Commission would act. Commission's counsel replied that it would be in a couple of months (R. 639). This was in February, 1938.

On March 16, 1938 the Staley Company filed a petition with the Commission in which it repeated its request for reconsideration (R. 97-104). The Staley Company alleged that the imposition of the switching charge of $2.27 per car on the Staley Company's traffic subjected the Staley Company to unequal treatment in violation of Section 2, and to undue prejudice in violation of Section 3 of the Interstate Commerce Act (R. 101-102). The Staley Company further alleged that the switching service for which it was required to pay this charge of $2.27 per loaded car was the same service which the same railroad and other railroads furnished under their established freight rates to all competitors of the Staley Company. The names of the Staley Company's competitors, together with the location of their plants, were set forth in detail in the petition (R. 100-101). The petition further alleged that the charge of $2.27 per loaded car was not then being made and never had been made at any other industry in Decatur or at other cities in which the same general system of freight rates was in force (R. 101).

The Commission by its order of April 8, 1938 modi-

fied by its order of May 4, 1938, reopened the proceeding for further hearing, but limited the hearing to the presentation of evidence of changes since the prior hearing in operating or other conditions with respect to the interchange, delivery or receipt of cars handled to or from the Decatur plant of the Staley Company (R. 21).

A further hearing was held at Chicago on June 27, 1938. The testimony offered at this further hearing is a part of the record before this Court (R. 242-370). At this hearing evidence was offered on behalf of the Staley Company showing that no charge is made in addition to the line-haul rate against the competitors of the Staley Company located in Decatur or at other places for the placement of cars at points of loading and unloading within their plants. This evidence was objected to by counsel for the Commission and was excluded by the Examiner (R. 270, 277, 278, 281, 282, 284, 288).

A tentative report on further hearing was proposed on or about November 1, 1938 by Mr. Homer T. King, Special Examiner of the Interstate Commission. The Special Examiner, after setting forth the history of the proceeding, and describing the changes that had taken place in operating and other conditions connected with the placement of cars at the Staley plant, recommended that the Commission should find that since the issuance of the Commission's report of May 22, 1936 in *A. E. Staley Manufacturing Co. Terminal Allowance,* 215 I. C. C. 656, substantial changes had occurred in the methods of spotting cars in the Staley plant, and that the spotting service then being performed was in conformity with the principles announced in the Commission's report in *Propriety of Operating Practices—Terminal Services,* 209 I. C. C. 11, and that such service might be performed by the Wabash under its line-haul rate without an additional charge (R. 5).

The Commission in its report of May 6, 1941 in the case at bar said (R. 21) that an incomplete record had resulted from this limited reopening of this proceeding, and that the Commission on July 29, 1939 (nine months after the tentative report had been issued), on its own motion had again reopened the proceeding for further hearing concerning the operating or other conditions at the plant of the Staley Company with respect to the delivery or receipt of cars handled to or from its plant in Decatur.

No action, however, was taken by the Commission towards setting down the proceeding for a further hearing.

A charge for spotting cars at the Staley plant has been in effect since June 15, 1937. This charge is in addition to the line-haul rates paid by the Staley Company on traffic moving to and from its plant. Appellees in the years that followed 1937 had an opportunity of observing the practical effect of the establishment of this charge against the Staley Company, a charge which appellees established under the findings of the Commission in *A. E. Staley Mfg. Co. Terminal Allowance,* 215 I. C. C. 656. Appellees, after giving the matter further consideration, and not unmindful of the long delay that had characterized the proceedings before the Commission, reached the conclusion that the continued imposition of this charge against the Staley Company was unjustified (R. 435).

Appellees, furthermore, were not unmindful of the growth of truck transportation and of the efforts that were being made by the motor truck operators to obtain a larger part of the traffic moving to and from the Staley plant. Decatur is within trucking distance of many large cities. Motor trucks are handling traffic to and from the Staley plant and have been making every

effort to participate to a greater extent in the Staley Company's traffic. The trucks come into the plant area and pick up the traffic at points of loading. The Commission has not required the truck operators to make a charge for terminal services performed by them in transporting freight to and from points of loading and unloading within the Staley plant (R. 626, 627, 642-652).

Appellees, therefore, on November 10, 1939, filed tariff schedules to become effective on December 15, 1939, whereby they proposed to cancel the charge of $2.50 per car then being collected from the Staley Company for the placement of cars within its plant. The tariffs specifically provide that loaded cars received and empty cars for loading via appellees' railroads will be placed for loading or unloading, as the case might be, at the Staley plant, and that the established freight rates for transportation to and from Decatur lawfully on file with the Commission include such service (R. 861).

These tariff schedules were suspended by the Commission in *Investigation and Suspension Docket No. 4736, Switching Charges at Decatur, Ill.* The Pennsylvania and the Baltimore & Ohio railroads did not join in these tariffs. At the hearing in this proceeding, however, neither the Pennsylvania nor the Baltimore & Ohio offered any objection to these tariffs (R. 475-499, 598-609).

Following the suspension of the tariff schedules of appellees, the Commission held a hearing in Decatur on April 23-25, 1940 in *Investigation and Suspension Docket No. 4736, Switching Charges at Decatur, Ill., and in Ex Parte 104, Part II, A. E. Staley Manufacturing Co. Terminal Allowance.* The record of this hearing is before this Court (R. 370-859). Four witnesses from the Commission's Bureau of Service testified at this hearing (R. 666-776). Their testimony was confined solely to a de-

scription of switching operations at the Staley plant. Not one of these witnesses dealt with the services which these appellees or other railroads customarily rendered shippers at Decatur or elsewhere on their lines in the receipt or delivery of traffic on team tracks or on industial sidings and spurs. Nor did any of these witnesses offer testimony dealing with the terminal services performed by appellees or other railroads at plants that compete with the Staley Company at Decatur or elsewhere.

The hearing developed that appellees make no charge against industries served by them at Decatur or at any other point on their lines of railroad for spotting services performed by them at such industries with one exception: the plant of the Staley Company at Decatur (R. 379, 458, 505, 506). Officers of the Staley Company and of the Staley Company's competitors testified that there is no soybean or corn-processing plant at which a charge is exacted by the railroads for spotting cars on the tracks of the industry (R. 552, 559, 563, 567, 625).

Officers of six processing plants, all competitors of the Staley Company, testified at the hearing (R. 544-575) respecting the location of their plants, the railroads serving those plants, the number of miles of track within the plants, the number of points of loading and unloading, and the switching services at those plants. Many of these plants are served by the appellees or some one of them. At not one of these plants is any charge made in addition to the line-haul rates for placing cars within the plant areas. Several of these plants are large plants (R. 544-546, 557, 558, 568-570). One of the plants, the plant at Argo, Illinois, is a larger plant than the Staley plant. The Argo plant has between 18 and 21 miles of trackage within the plant, and has from 20 to

25 places at which cars are spotted (R. 546). The Staley plant has 14.1 miles of trackage within the plant (R. 29). There are 18 places within the Staley plant at which cars are spotted. There are 4 principal points of loading and 5 of unloading, a total of 9 (R. 32, 34).

The testimony offered by appellees' operating officers, men of long experience in the practical operation of terminals (R. 397, 520, 592-593), showed that the switching of a given number of cars at the Staley plant is less burdensome and less expensive than the switching of the same number of cars at other industries and team tracks in the Decatur Switching District. Appellees call especial attention to the testimony on this point of C. A. Johnson, Superintendent of the Wabash Railroad at Decatur (R. 849-853); Charles Curran, General Yard Master of the Wabash Railroad at Decatur (R. 535-537), and T. K. Beach, Train Master of the Illinois Central Railroad (R. 405-409).

The Commission's report gives emphasis to the volume of the traffic moving to and from the plant of the Staley Company. In 1939 the Staley cars transported by all the railroads reaching Decatur aggregated 42,887 cars (R. 26). The record does not show the number of cars loaded and unloaded at the various points within the Staley plant during 1939. The record does show the number of cars loaded and unloaded at the various locations within the Staley plant in 1937 (R. 257-268) when 33,857 cars were spotted. There were 9,437 cars of grain, or 28 per cent of the total, unloaded at Elevator C in 1937 (R. 33). The coal unloaded at the coal dock aggregated 4,562 cars, or 13 per cent of the total (R. 34). There were 3,321 cars loaded at the feed warehouse and elevator. Soybean products loaded at Building No. 48 in 1937 aggregated 4,245 cars (R. 86). Products loaded at Buildings Nos. 16 and 20 amounted to 3,505 cars in 1937 (R. 45).

Mr. Commissioner Mahaffie, dissenting from the Commission's report in the case at bar, in which dissent he was joined by Mr. Commissioner Alldredge, said (R. 46):

> "If the 40 elevators, mills, and other buildings constituting the plant of the Staley Company were each owned and operated by a separate concern, the railroads would be required to serve each of them at the line-haul rate. The real difficulty here is size. If the size of an industry is hereafter to determine whether it may or may not have terminal service without extra payment, we should immediately establish some uniform standard so that the permissible limits may be known."

The Commission in its report comments at length on the effect of switching arrangements on carriers' revenues (R. 22-27). Mr. Commissioner Mahaffie in his dissenting opinion thus deals with this matter (R. 45-46):

> "The suspended schedules, in my opinion, have been justified. The result of our attempting to save these railroads from what we considered their profligacy is told in the report as to one of them as follows:
>
> > 'It follows that substitution of the existing arrangement for the pool arrangement caused the Illinois Central to lose $92,888.80 on Staley traffic handled during the years 1938 and 1939, while, if the old allowance arrangement had been substituted for the pool arrangement, the resulting losses in Illinois Central revenue would have been but $40,406, based upon an allowance of $2 per car.'
>
> "The others, except perhaps the Wabash, fared much the same. The allowance was the carriers' plan intended to meet, at the least possible cost, their carrier obligations. We held it bad. The pool plan was devised to try to meet our objections. Our representatives are said to have discouraged its use. Consequently, the present more costly plan is now being used. In this way the procedure intended by

us to cut railroad expenses and to increase net earnings has had exactly the opposite effect."

On May 6, 1941 the Commission made its report in the two proceedings referred to (*A. E. Staley Manufacturing Co. Terminal Allowance,* 245 I. C. C. 383, R. 17-46). The Commission deals at length with the history of the terminal services at the Staley plant and the circumstances and conditions surrounding the handling of traffic to and from points of loading and unloading within the plant. It makes certain findings of fact and conclusions (R. 42, 43), some of which, as we shall later point out, are without any support in the facts stated in the report and without any foundation in the evidence.

On the same date the Commission entered its order in *I. & S. Docket No. 4736, Switching Charges in Decatur, Ill.,* and required these appellees to cancel the schedules on or before June 20, 1941, which had been suspended in that proceeding and in which these appellees proposed to eliminate the switching charge against the Staley Company (R. 46).

Thereafter appellees and the Staley Company filed at various times with the Commission their petitions for vacation of the order of May 6, 1941 and for reconsideration (R. 47-79). The Commission on July 31, 1941 denied all these petitions.

The complaint was filed in the lower court on June 1, 1942 (R. 1). The case was heard by that court on April 26, 1943 (R. 121-122). The court rendered its opinion on July 14, 1943, in which it held that the Commission's order of May 6, 1941 was invalid and that the prayer for an injunction should be allowed (R. 134-139). Circuit Judge Evans dissented. The court on the same day entered its Findings of Fact and Conclusions of Law (R. 139-143). Circuit Judge Evans dissented not from these Findings but from the conclusion that the plaintiffs (the

appellees here) were entitled to a decree (R. 143). The final decree was entered by the court on July 14, 1943, setting aside and annulling the order of May 6, 1941 and permanently enjoining the enforcement of that order (R. 143-144).

## SUMMARY OF ARGUMENT.

The error of law that vitiates the order in the case at bar is the Commission's failure to observe the statutory standards which govern its action. When the facts in a case give rise to a question not only under Section 1, requiring just and reasonable rates and practices, but also under Section 2, forbidding unjust discrimination, and under Section 3, forbidding undue preference or prejudice, the Commission may not close its eyes to the issues under Sections 2 and 3 and proceed over a period of many years as though those sections did not exist.

These appellees have been required to impose a spotting charge against the Staley Company for the placement of cars within the Staley plant in Decatur pursuant to the Commission's orders ever since June 15, 1937. Appellees make no similar charge for switching any other industry or team track in the Decatur Switching District or at any other point on their lines. No competitor of the Staley Company located at Decatur or elsewhere pays such a charge.

These matters were brought to the Commission's attention through the years by petitions filed by the Staley Company, by tariffs filed by these appellees, and by the testimony presented by both the Staley Company and these appellees at hearings before the Commission, in briefs and upon argument.

The Interstate Commerce Commission, nevertheless, for more than six years took no steps towards investi-

gating the spotting services rendered by these appellees at other industries and on team tracks in the Decatur Switching District, or elsewhere on their lines, or at plants competing with the Staley Company. Appellees, recognizing the inequality in treatment to which the Staley Company was being subjected, proposed by tariffs filed on November 10, 1939, to eliminate the spotting charge against the Staley Company. These tariffs were suspended by the Commission in *I. & S. Docket No. 4736, Switching Charges at Decatur, Ill.*, the case at bar. The Commission's order of May 6, 1941, disapproved of this method of eliminating an admitted inequality. But the Commission itself never undertook any investigation for the purpose of developing facts that would enable it to remove the inequality in a way that it considered would be proper and lawful.

Appellants in their brief admit that the Staley Company has been subjected to an inequality in treatment (pp. 66, 80). They stamp this inequality in treatment, however, as a "temporary" one. An inequality in treatment extending over a period of more than six years cannot be said to be a temporary one. The Interstate Commerce Act, does not distinguish between "temporary" and "permanent" inequality. This case in the last analysis comes down to a matter of simple justice.

Appellants take the position that the Commission, in reaching a determination whether the spotting services at a given plant exceed the carrier's legal obligation under its line-haul rates, is not required to go beyond an investigation of the services as rendered at such plant. But a determination of the question whether those spotting services are excessive, whether they are over and above those that are ordinarily and customarily rendered, and beyond the carrier's legal obligation under its line-haul rates, requires not only an examination of the spotting services actually rendered at a particular

plant, but a comparison of those services with the spotting services at other plants and on team tracks in the same locality. The Commission in many cases has said that one test whereby it may be determined where a particular service exceeds a carrier's line-haul obligation is the customary service extended to the rank and file of industries, including competing industries, in the same general district and in the same rate group, and that another test is the service rendered in switching team tracks in the same locality. Thus the Commission failed to apply not only the statutory standards which govern its actions, but the principles which it itself has laid down for the determination of these questions.

The testimony of appellees' operating officers, men of long experience in the operation of terminals, shows without contradiction that the services rendered in switching a given number of cars at the Staley plant are less burdensome and less expensive than those rendered in switching the same number of cars at other industries and team tracks in the Decatur Switching District. Thus the appellees, when they applied the tests laid down by the Commission itself, found no justification for the inequality in treatment which they had been required for more than six years to impose upon the Staley Company under the orders of the Commission.

Where one industry has been singled out for exceptional and inequitable treatment over a long period of time, where spotting charges are required under the orders of the Commission to be assessed against that industry but against none of its competitors in the same locality, or elsewhere, and where issues are raised under Sections 2 and 3, the Commission cannot make a fair determination of whether the spotting services at that industry exceed the carrier's legal obligation, until it has compared those services with the services customarily and ordinarily rendered at other industries, in-

cluding competing industries, and on team tracks in the same locality and in the same territory. And if the record is lacking in sufficient facts to enable it to reach a fair and just determination of the question, the Commission, through the exercise of the broad powers of investigation possessed by it, can develop all pertinent and necessary facts.

It was inevitable that the Commission's course of action through the years in this litigation should lead to the very inequality in treatment that the Act was intended to prohibit and prevent.

The Commission, following the opinion and decree of the lower court in the case at bar, instituted an investigation on July 31, 1943, with respect to terminal services at four plants of the Staley Company's competitors which were named by the lower court in its opinion. This investigation is referred to in the Commission's Fifty-seventh Annual Report, extracts from which appear in Appendix II of appellants' brief. This investigation was plainly responsive to the opinion of the lower court and is a recognition of the truth and justice of the lower court's opinion and decree.

The Commission, furthermore, has recognized by this investigation that Sections 2 and 3 of the Act exist and that these sections must be applied and enforced in a general investigation instituted by the Commission on its own motion. But the inequality in treatment against the Staley Company is continued, notwithstanding this investigation. Failure of the Commission to take any action towards eliminating the charge against the Staley Company during the pendency of this investigation requires these appellees to continue the spotting charges against the Staley Company. Thus the Staley Company is left helpless in the interval, as it has been left helpless during the last six years.

It was arbitrary action on the part of the Commission, under the circumstances disclosed by this record, to require appellees to continue a spotting charge against the Staley Company and to take no steps for more than six years to determine whether the continuance of the charge resulted in violations of Sections 2 and 3, and if so, how those violations should be removed. When the appellants admitted that the Commission's action has resulted in inequality of treatment, this was tantamount to saying that it was arbitrary.

The lower court recognized the principle that administrative questions of preference and prejudice are to be determined in the last analysis by the Commission. It left such questions to the determination of the Commission in accordance with the statutory standards which govern its action. Appellees did not seek in the lower court a decree that would permanently remove the spotting charge from the Staley Company or that would require the imposition of a similar charge at the plants of the Staley Company's competitors. Appellees ask that the decree of the lower court be affirmed to the end that the Commission may be in a position to reconsider the whole situation in accordance with the provisions of the statute.

The Commission in its report in the case at bar made certain findings of fact and conclusions. The question whether these findings and conclusions are supported by the evidence can be reached only when it is clear that the statutory standards which govern the Commission's action have been applied.

Appellees have shown, however, that certain subsidiary findings of fact and conclusions are without any support in the facts stated in the report and without any support in the record, and are in fact contrary to the facts in the record. These findings and conclusions are similar to those made in the earlier cases decided by the

Commission. Appellees have called attention to them for the purpose of showing not only that they are without support, but that the Commission made these findings in a formal and perfunctory way. The Commission merely adopted the findings it had used in the earlier cases, failing to consider that the facts and issues in those cases were wholly different from those in the case at bar.

The Commission has failed all through this litigation to bend its mind to the problems confronting it. It has failed to follow the statutory standards which control its action and the principles which it itself has evolved for the purpose of determining whether a given service exceeds a carrier's legal obligation. The effect of the lower court's decree is simply to require the Commission to bend its mind to the issues and to consider the factors that must be considered if justice is to be done in such a case. As the lower court put it in its opinion (R. 138):

> "To give full meaning to the Act and to translate the intention of Congress into equitable application requires a consideration of the Act as a whole. * * *"

## ARGUMENT.

### I.

**The Commission failed to apply the statutory standards which govern its action and which determine the rights of parties before it.**

**The Commission has proceeded throughout all this litigation as if Sections 2 and 3 were nonexistent, in the face of the fact that issues were raised under these Sections. Appellants now concede that the Commission's order has resulted in an inequality in treatment.**

The fundamental error of law into which the Commission fell in the case at bar is its assumption, per-

sisted in over a long period of time, that it was free from the statutory standards which govern its action and could apply only those standards that it chose. The Commission since May 22, 1936, the date of its decision in *A. E. Staley Mfg. Co. Terminal Allowance,* 215 I. C. C. 656, has dealt with the spotting services at the Staley plant as though those services were performed in a vacuum, and bore no possible relation to the services performed by appellees at other plants and on team tracks in Decatur and elsewhere on their lines.

The Commission has proceeded on the theory that it could separate and segregate the Staley Company from all other industries and from shippers on team tracks in Decatur and elsewhere and could require appellees to impose a spotting charge against the Staley Company without regard to the question whether such action resulted in unjust discrimination in violation of Section 2 or in undue prejudice in violation of Section 3.

The heart of the Interstate Commerce Act is found in Section 1, requiring reasonable rates and practices, in Section 2, forbidding unjust discrimination, and in Section 3, forbidding undue prejudice and preference. Whether in a given case the Commission is called upon to consider an issue under one or all of them depends upon the facts and the issues raised by the parties. The first question that presents itself in a case of this kind is one arising under Section 1(5) and (6): the extent of the carrier's legal obligation under its line-haul rates.* But these cases may also involve questions arising under Sections 2 and 3.

The Commission was created by Congress to apply and enforce not only Section 1 but Sections 2 and 3 of the

* *Interstate Commerce Acts Annotated,* Section 1(5), Note 521, and Section 1(6), Notes 666-671.

Act. This Court has said * that the great purpose of the Interstate Commerce Act, while seeking to prevent unjust and unreasonable rates,

> "was to secure equality of rates as to all and to destroy favoritism. * * * It was to compel the carrier as a public agent to give equal treatment to all. * * *"

This Court has more than once held ** that a charge may be perfectly reasonable under Section 1, yet create an unjust discrimination and unreasonable preference under Sections 2 and 3.

Thus the Commission cannot close its books when it has reached a determination under Section 1 whether a particular service comes within the scope of the carrier's legal obligation. For questions under Sections 2 and 3 may be present, dependent of course upon the facts. Where they are present, as in the case at bar, the Commission may not, even in an investigation instituted on its own motion, ignore them. Moreover, the order of May 6, 1941, here assailed, was issued in an investigation and suspension proceeding. The Commission holds that such a proceeding presents issues not only under Section 1 but under Sections 2 and 3. * * *

Appellees have set out in their Statement (p. 4) the history of this litigation. Appellees there refer to the petitions filed with the Commission by the Staley Company, to the tariffs filed with the Commission by appellees, to the testimony offered by officers for both the Staley Company and appellees at the hearing in the case at bar, all of which brought home to the Commission not once but many times the inequality in treat-

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* *New Haven R. R. Co.* v. *Inter. Com. Com.*, 200 U. S. 361, pp. 391, 392.

** *Inter. Com. Com.* v. *B. & O. R. Co.*, 145 U. S. 263, p. 277; *American Express Co.* v. *Caldwell*, 244 U. S. 617, p. 624.

*** *Chicago Board of Trade* v. *I. C. R. R. Co.*, 26 I. C. C. 545; *Class Rates Between Stations in Louisiana*, 33 I. C. C. 302; *The Excelsior and Flax Tow Cases*, 36 I. C. C. 349.

ment to which appellees have been required to subject the Staley Company over a long period of time. That the Commission deliberately closed its eyes to issues of unjust discrimination and undue prejudice is shown by the fact that at the hearing held in June, 1938 (R. 242-370), all evidence offered dealing with the spotting services at the plants of the Staley Company's competitors in Decatur and elsewhere was objected to by Commission's Counsel and was excluded by the Examiner (R. 270, 277, 278, 281-288).

Appellants in their brief admit that the Staley Company has been subjected to inequality in treatment as a result of the Commission's action in this litigation (pp. 66, 80). While they seek to soften this inequality by calling it a temporary one, an inequality that has existed for more than six years clearly oversteps the bounds of being temporary. The fact of the matter is that the Commission has proceeded throughout this long period of time on the assumption that it was not required to do anything about the matter.

The facts respecting the history of this litigation and the various steps that have been taken therein as set out in appellees' Statement (p. 4), should have challenged the Commission's attention. They put the Commission upon notice that at the Staley plant these appellees had been required over the years to make a charge for spotting cars, but that they had not been required to make a similar charge against competitors of the Staley Company located in Decatur and elsewhere, and that no competitor of the Staley Company paid such a charge.

From whatever aspect the matter be approached, it is clear that the Commission has assumed through the years that it could treat Sections 2 and 3 of the Act

as nonexistent, that it could require appellees by its orders to continue over a six-year period an inequality in treatment against the Staley Company, and that it was not required to take any action looking towards the removal of that inequality. The Commission after the entry of the decree of the lower court instituted an investigation respecting spotting services at the plants of those competitors named by the lower court in its opinion. But it is clear that the institution of this investigation was responsive to the court's opinion and decree and would not have been instituted had it not been for that opinion and decree.

Appellants go so far as to argue (p. 63) that the Interstate Commerce Act forbids only carriers from committing a forbidden discrimination and preference. They have forgotten what this Court said in *Inter. Com. Com.* v. *C. R. I. & P. Ry. Co.*, 218 U. S. 88 (p. 102):

> "* * * From whatever standpoint the powers of the Interstate Commerce Commission may be viewed, they touch many interests, they may have great consequences. They are expected to be exercised in the coldest neutrality. The Commission was instituted to prevent discrimination between persons and places. It would indeed be an abuse of its powers to exercise them so as to cause either. * * *"

Appellees submit that if the Commission had recognized that it was its duty to apply not only Section 1 but Sections 2 and 3, to consider not only the spotting services at the Staley plant but how those services compared with the spotting services at other plants and on team tracks in Decatur and at the plants of the Staley Company's competitors, the Commission might have reached a different conclusion in the case at bar. The Commission might well have found that the spotting services at the Staley plant, when considered not only in and of themselves, but when compared with the spot-

ting services rendered at other plants and on team tracks, did not exceed those which the railroads customarily and generally render or can be required to render under their line-haul rates. And the responsibility resting upon the Commission of giving consideration to such comparisons was all the greater because of the long period of time during which the Staley Company alone of all companies engaged in the same business had been subjected to the payment of a spotting charge. If there was any doubt in the Commission's mind whether the evidence respecting comparisons was adequate, the Commission had the power under the Act (Sections 13(2) and 15(1) to make whatever further investigation of the facts it deemed necessary.

The issues under Sections 2 and 3 of the Act were inherent in this proceeding. The very history of the case, the manner in which the case was dealt with by the Commission, gave rise to these issues. They could not be escaped or avoided. And the Commission fell into a plain error of law in assuming that under the facts it could ignore the provisions of Sections 2 and 3.

The Commission dealt in the following language with the testimony (R. 544-572) respecting the switching services rendered at the plants of the Staley Company's competitors (R. 42):

> "Considerable evidence was introduced showing spotting is performed without charge in addition to the line-haul rates at various plants, some of which compete with the plant of the Staley Company. The evidence does not satisfactorily show that the circumstances and conditions under which the spotting is performed at such plants are substantially similar to those at the Staley plant. If it did, it would only show the probability of the existence of unlawful practices at such plants and the need for investigations in connection therewith."

Appellees submit that the Commission here recognized that justice could be done only by investigating the practices at other plants. It should be borne in mind that the Commission in dealing with such questions is not required to indulge in probabilities. The Commission under the broad powers it possesses under Section 13(2) and of Section 15(1) of the Act with respect to the institution of investigations on its own motion, has the power to reduce speculation and probabilities to a certainty. This it should have done in the case at bar before entering an order the direct effect of which was to continue an admitted inequality against the Staley Company.

Appellees direct attention to what the District Court said in its opinion respecting this finding of the Commission (R. 137):

> "While the Commission says that the evidence does not satisfactorily show that the conditions at other plants are substantially similar to those at the Staley plant, yet the only evidence in the record on this subject very strongly tends to show similarity. By its further statement that if it did it would only demonstrate the need for investigations at other plants, it appears that the Commission was of the belief that each case must stand on its own bottom and be considered by the Commission independent of any other and without relation to the palpable inequities bound to flow from an order not applicable to all similarly situated. We think this too narrow a view. * * *"

But this narrow view, this position taken by the Commission, that under no circumstances is it required to extend its investigations beyond the four corners of a plant area in order to determine whether the spotting services at that plant are in excess of a carrier's legal obligation, is urged by appellants in their brief. They argue (pp. 61-62) that the Commission is required to

look only to the "evidence respecting the operation at (each) plant," citing *United States* v. *American Sheet & Tin Plate Co.*, 301 U. S. 402, page 411. The Court in that case said (p. 411):

> "The Commission properly held that each case must be decided upon the circumstances disclosed. It accordingly examined the evidence respecting the operations at the plants of each of the appellees and made its findings with respect to each upon the evidence in the record. * * *"

No justification for the narrow view taken by appellants can be extracted from what this Court here said. Of course each case must be decided upon the circumstances disclosed. But those circumstances will differ as the cases differ. Facts will be present in one case that are not present in another.

It only requires a reading of the Commission's opinion in the cases that were before this Court in *United States* v. *American Sheet & Tin Plate Co.*, 301 U. S. 402,* and the Court's opinion in that case to understand that the issues were entirely different from those in the case at bar. These earlier cases before the Commission and this Court had no such history, no such background of facts, and no such issues as the case at bar has.

The lower court recognized the distinction between the case at bar and the decision of this Court in *United States* v. *American Sheet & Tin Plate Co.*, 301 U. S. 402, when it said (R. 138):

> "We think that *United States* v. *American Sheet & Tin Plate Co., supra,* is not to be deemed authority contrary to the view here expressed. While it is true that the Supreme Court there said in affirm-

* *American Sheet & Tin Plate Co. Terminal Allowance*, 209 I. C. C. 719; *Allegheny Steel Co. Terminal Allowance*, 209 I. C. C. 273; *Pittsburgh Plate Glass Co. Terminal Allowance*, 209 I. C. C. 467; *Weirton Steel Co. Terminal Allowance*, 209 I. C. C. 445; *West Leechburg Steel Co. Terminal Allowance*, 210 I. C. C. 213; *Pittsburgh Plate Glass Co. Terminal Allowance*, 210 I. C. C. 527.

ing the order of the Commission that the Commission had properly held that each case must be decided upon the circumstances disclosed, yet the question of discrimination here presented was not before the Court. In that case and in *United States v. Pan-American Petroleum Corp., supra,* the Court was dealing with a number of like orders in relation to a group of competing industries and no question of one industry having received different treatment from all others was before the Court."

In other words, a consideration of the switching services at other industries becomes a part of the "circumstances disclosed."

It will be seen from Appendix II attached to this brief that the Commission within a comparatively short period of time in 1935 and 1936 handed down many decisions involving allowances to iron and steel companies. No question of discrimination could arise when the Commission within a comparatively short time dealt with the matter of allowances and spotting services to competing industries. The terminal services at the plants, moreover, had been investigated by the Commission in 1931 and 1932, but its reports were not issued until 1935 and 1936. All during this time these industries, as shown by the findings and decisions later entered, were receiving a service over and above the service the railroads were legally obligated to render and were receiving a refund from the published tariff rates.

Yet appellants in their brief argue in substance that at no time would it have been fair for the Staley Company to have been placed on a plane of equality with its competitors pending the results of investigation by the Commission, because the Staley Company during the period of investigation would have received a remission from the published tariff rates. Appellees submit, however, that if the course pursued by the Commission from 1931 to 1936 in the handling of these matters was right,

such a course would have been right in the succeeding years. If the Commission instead of selecting one industry out of many in the field, and requiring the railroads to impose a spotting charge against that industry, had waited until it had made an investigation of the services rendered at competing plants and on team tracks in the same locality and in the same rate group, the Commission might well have found that the services in question did not exceed the services that the railroads are customarily and generally rendering under their line-haul rates.

The facts and the issues in the case at bar, the action taken over the years by the Commission with respect thereto, stand out in marked contrast to the facts and the issues in the cases that the Commission decided in 1935 and 1936 and which were later considered by this Court, and to the procedure followed by the Commission in its consideration of these cases.

Appellants state (p. 61) that the lower court found that if a spotting charge is to be imposed upon the Staley Company, the spotting charge must be imposed upon the plants of the claimed competitors of the Staley Company. The court made no such finding. What the court held in substance was that the time had come when the spotting charge should be taken off the Staley plant pending a further investigation of the services at that plant and the services at plants of the Staley Company's competitors.

Appellants suggest that if the principle announced by the court should be established (a principle which the court did not announce) it would require the Commission to order a spotting charge against all industries proved to be competitors of the one involved in the case before it without an investigation or hearing. But this conclusion is purely a fanciful one. Each industry would, of course,

be entitled to a full and fair hearing with respect to the spotting services at its plant. But that hearing would present the question whether the spotting services at such plant were excessive when compared with the spotting services ordinarily rendered by the railroads in the same locality or in the same rate group, including the spotting services not only at other industries but on team tracks. The purposes of the Interstate Commerce Act cannot be served by action on the part of the Commission which eliminates what the Commission believes to be a violation of Section 1, but which action at the same time creates violations of Sections 2 and 3. The Commisson has ample power to make whatever investigations are necessary to insure that any orders that it enters will meet the standards laid down not only in Section 1 but in Sections 2 and 3.

It is impossible to reconcile the position taken by the Commission in the case at bar that no issues under Sections 2 and 3 present themselves in a case of this kind with the position it took in a long line of cases* in which it held that the railroads were chargeable with unjust discrimination or undue prejudice because of their refusal to treat alike, so far as terminal services or allowances were concerned, industries competing with one another.

Yet appellants now argue in their brief that the Commission may require the railroads to do the very thing that the Commission in these cases found that the railroads would not be permitted to do. The Commission here recognized that these cases not only present the

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* *Alan Wood Iron & Steel Co.* v. *Pennsylvania R. R. Co. et al.*, 22 I. C. C. 540, p. 543; *Westport Stone Co.* v. *C. C. C. & St. L. Ry. Co.*, 48 I. C. C. 637; *National Malleable Castings Co.* v. *Pittsburgh & Lake Erie R. R. Co. et al.*, 51 I. C. C. 537, p. 538; *Empire Steel & Iron Co.* v. *Dir. Gen.*, 56 I. C. C. 158, p. 189; *Donner Steel Co.* v. *D. L. & W. R. R. Co. et al.*, 57 I. C. C. 745; *Riter-Conley Mfg. Co.* v. *Dir. Gen.*, 58 I. C. C. 327; *Carey Mfg. Co.* v. *Dir. Gen.*, 59 I. C. C. 640, p. 647; *Jackson Iron & Steel Co.* v. *Dir. Gen.*, 91 I. C. C. 201, p. 211.

question of where "transportation" begins and ends, but may, dependent upon the facts, present questions under Sections 2 and 3.

In one of these cases (*Alan Wood Iron & Steel Co.* v. *Pennsylvania R. R. Co. et al.*, 22 I. C. C. 540), the Commission said (p. 545):

> "That it is the carrier's duty to accord equality of service and equality of rates to all under substantially similar circumstances and conditions is beyond question. A carrier may not perform a switching service for one plant and decline to perform it at a competing plant in the same general territory on the ground that it is more convenient to perform the service at one plant than at the other, or because it has been customary to do it at one and not at another. * * *"

The Commission cannot determine whether equality of service and equality of rates have been achieved unless it bears in mind the standards embodied in Sections 2 and 3 of the Act, and applies those standards to the facts and issues in the case at hand.

One case involving discrimination between competing industries deserves particular mention. In *Carey Mfg. Co.* v. *Dir. Gen.*, 59 I. C. C. 640, the Commission had before it the complaint of the Carey Company that the allowance paid to it for spotting cars at its plant was less than the actual cost of the service to the Carey Company, and that the railroads were rendering a similar spotting service for competing shippers in the same district without charge in addition to the line-haul rates. The Commission said in part (pp. 642-3):

> "* * * Aside from any question of the extent of a carrier's legal obligation as to the delivery of carload traffic without charge in addition to the line-haul rates, if unjust discrimination or undue prejudice is found to result from the failure or refusal

of the carrier to perform the spotting service for one shipper or to make that shipper a proper allowance therefor, while it renders a like spotting service for other and competing shippers, we may require by order the removal of unjust discrimination or undue prejudice. * * *"

The Commission found (p. 645) that the legal obligation of the railroad under its line-haul rate did not require it to spot complainant's cars at the points of loading and unloading within the plant. But the Commission made the significant statement that although the spoting service be not regarded as a service contemplated under the line-haul rate, discrimination or prejudice may exist through the performance of a similar service for others. And the Commission, making a comparison of the spotting services at the complainant's plant with the spotting services at the plant of a competitor located but a short distance from the complainant's plant, (the very kind of comparison which the Commission in the case at bar has failed and refused to make and which the appellants in their brief say it is not obliged under any circumstances to make) found that the Carey Company was subjected to undue prejudice. The Commission here did not construe the law in such a way as to create two violations of law by the elimination of one alleged violation. And it must be borne in mind that through the broad powers of investigation possessed by the Commission (Sections 13(2) and 15(1)), the Commission can develop all the facts in a given situation that will enable it to dispose at one time of all the issues that present themselves.

The holding in *Allegheny Steel Co.* vs. *Dir. Gen.*, 60 I. C. C. 575, was similar to the holding in the case appellees have just discussed. The Commission there found that it was not unreasonable for the railroad to refuse to make an allowance to the complainant, but

that the failure either to perform the switching service or make an allowance subjected the complainant to unjust discrimination as between it and similarly situated competitors in the Pittsburgh rate district for whom such services were performed without additional charge or to whom allowances were made.

The railroad later made an allowance to the Allegheny Steel Company. The lawfulness of this allowance was considered by the Commission in *Allegheny Steel Co. Terminal Allowance,* 209 I. C. C. 273. The Commission there held that the payment of an allowance was unlawful. But it is of the greatest importance to observe that the Commission on or about the time it decided this case (June 7, 1935), decided a great many other cases involving terminal allowances then being granted by railroads to steel companies in the Pittsburgh rate district, as well as to steel plants in other rate districts. (Appendix II.)

There is another aspect of the Commission's action in the case at bar which deserves consideration. Both the Commission and the Courts have recognized that it has long been the custom of railroads in this country to receive and deliver carload freight on spur tracks leading to private industries at convenient points for loading and unloading, without imposing any charge therefor in addition to the line-haul rates.*

We have, therefore, uniformity in the application of the line-haul rates in this country, under which such rates include the terminal services connected with the placing of cars at points of loading and unloading within plant areas at origin and destination. There are exceptions to this practice, but they for the most part

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* *Car Spotting Charges,* 34 I. C. C. 609, p. 616; *Associated Jobbers of Los Angeles* v. *Atchison, T. & S. F. Ry. Co.,* 18 I. C. C. 310, affirmed, *Los Angeles Switching Case,* 234 U. S. 294; *Propriety of Operating Practices—Terminal Services,* 209 I. C. C. 11, p. 32; *United States* v. *American Sheet & Tin Plate Co.,* 301 U. S. 402, p. 409.

are those which have been made by the Commission in its decisions, and those where the industry, for reasons of its own, prefers to perform the switching service by its own engines.

What was the effect of the Commission's order in the case at bar in the light of the custom prevailing in this country respecting the spotting of cars on industry tracks? It was to separate the Staley Company from competing industries and other industries in Decatur and elsewhere, to place the Staley Company in one category and competing industries and other industries in another, to require the continuance of a charge against the Staley Company for spotting services when no charge is assessed against the Staley Company's competitors or other industries at Decatur or at any other points reached by appellees, and when no charge is assessed against the competitors of the Staley Company located on other railroads. It ought to be clear that when such an exception is carved out by the Commisson from the prevailing custom, the justification for such exceptional treatment, for such an inequality, should be made plain. A report of the Commission making any such exception to the general rule ought to show on its face that the Commission has applied all the standards laid down in the Act that govern its action, and that it has given due consideration to all the factors involved. This the Commission failed to do in the case at bar.

Appellants state in their brief (p. 78) that in many cases the Commission does not know of the existing inequities, that those who encounter inequities know of their existence and complain to the Commission, but that the Staley Company and appellees filed no complaints with the Commission. But in the case at bar the Commission was not once but many times advised of the existing inequities, inequities, moreover, brought about not by the action of the railroads but by the compulsion

of the Commission. Those who encountered unequal treatment, and those who were required to mete out unequal treatment, complained to the Commission not once but many times. But their complaints fell upon deaf ears. The Commission knew about the existing inequities but failed and refused to do anything about them.

Appellants state that the inequalities complained of can be removed in three ways: (1) by the voluntary action of the carriers in filing their tariffs; (2) by complaint to the Commission, filed by either the Staley Company or appellees; or (3) by action of the Commission on its own motion.

It is plain, however, that it is beyond the power of appellees to remove the inequalities complained of by imposing through the publication of tariffs a similar charge on the Staley Company's competitors. This method presupposes that appellees switch the plants of each and every one of the competing industries and are in a position to control the publication of spotting charges at such plants. This is not the case, however. Take, for example, the plant of the Corn Products Refining Company at Argo, Ill. This plant is switched by the Belt Railway (R. 546-549). The line-haul railroads in Chicago reach the Argo plant through the medium of switching absorptions; that is to say, they provide in their tariffs that they will absorb the switching charges of the Belt Railway (R. 549). It would be of no avail for the appellees, the Wabash and the Illinois Central, to file tariffs naming a switching charge against the plant at Argo, while all the other railroads that reach Chicago continued to apply their line-haul rates to and from points of loading and unloading within the plant. The same situation exists at the plant of the American Maize Company at Roby, Ind. (R. 557-559), at the plant of the Union Starch & Refining Company at Granite City, Ill. (R. 568-570), as well as at other plants.

If the course here suggested by appellants were followed by appellees, it would simply mean that the traffic would move via the lines of carriers not publishing such tariffs, and the inequality would remain.

Appellants suggest that the inequalities complained of could be removed by a complaint to the Commission, filed either by the Staley Company or the appellees. But it was not necessary for the Staley Company or appellees to file such a complaint. In the *first* place it should be borne in mind that *Ex Parte 104, Part II, Terminal Services,* was a proceeding instituted by the Commission on its own motion, and in the *second* place the Commission well knew from the petitions filed in that proceeding by the Staley Company, from the tariffs filed by appellees and suspended in *I. & S. Docket No. 4736, Switching Charges at Decatur, Ill.,* from the testimony presented at the joint hearing in both cases, and from the briefs and arguments, that appellees had been required to impose upon the Staley Company an inequality in treatment. No additional or different complaint was required to lay the facts before the Commission, and to bring home to the Commission this inequality in treatment. The Commission should have applied the principles that it has so many times announced: that technicalities will not be permitted to defeat the ends of justice, that it is not over-exacting with respect to the form or the nature of the pleadings, that it looks to the substance of the complaint rather than to the form, and that even though a complaint may be artificial in form, it is sufficient if it contains the essential averments of a complaint.*

Appellants here in effect argue that the shadow rather than the substance should control.

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* *Memphis Freight Bureau* v. *St. L. S. W. R. R. Co.*, 18 I. C. C. 67, p. 69; *United States Leather Co.* v. *S. Ry. Co.*, 21 I. C. C. 323, p. 324; *Stuarts Draft Milling Co.* v. *S. Ry. Co.*, 31 I. C. C. 623, p. 724; *Wasatch Coal Co.* v. *Dir. Gen.*, 68 I. C. C. 118, p. 120; *Tovrea & Co.* v. *Dir. Gen.*, 81 I. C. C. 583; *Fork Mountain Coal Co.* v. *C. N. O. & T. P. Ry. Co.*, 206 I. C. C. 106, p. 110.

Appellants say (p. 79) that the third method, action by the Commission on its own motion, would relieve the Staley Company and the carriers from preparing and submitting evidence in support of the issue, would leave them free to oppose the Commission's efforts, and place all the burden of investigation upon the government. This is a wholly erroneous statement. Both the carriers and the Staley Company took an active part in the submission of evidence in the case at bar, and all the burden of investigation was not placed upon the government. Furthermore, the parties in a proceeding instituted by the Commission on its own motion still have the right to oppose the Commission if they think that the Commission is wrong.

There were, moreover, various methods at hand by which the Commission could have developed many facts that would have aided it in any investigation of the spotting services at other plants, including the plants of the Staley Company's competitors. The Commission could, through the medium of a prehearing conference, specific provision for which is made in its Rules of Practice* call together the interested railroads and the shippers, determine the plants that were of such size as to warrant an investigation, and develop ways and means for expeditiously ascertaining the facts. The task is no more an impossible task than that which the Commission has encountered in the cases involving, for example, the class rates in the various territories,** the general level of all rates in the country,*** and the in-

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* *Rule 68 of the General Rules of Practice.*

** *Southern Class Rate Investigation,* 100 I. C. C. 513; *Eastern Class Rate Investigation,* 164 I. C. C. 314; *Western Trunk Line Class Rates,* 164 I. C. C. 1.

*** *Fifteen Per Cent Case,* 1931, 178 I. C. C. 539; *General Rate Level Investigation,* 1933, 195 I. C. C. 5; *Emergency Freight Charges,* 1935, 208 I. C. C. 4; *General Commodity Rate Increases,* 1937, 223 I. C. C. 657; *Fifteen Per Cent Case,* 1937-1938, 226 I. C. C. 41; *Increased Railway Rates, Fares, and Charges,* 1942, 248 I. C. C. 545, 255 I. C. C. 357.

vestigations made pursuant to the so-called Hoch-Smith Resolution.*

Another example will suffice to show what means the Commission has of investigating the facts in an expeditious and economical manner. The Commission has recently asked many railroads in Illinois territory, including appellees, to make a detailed investigation of the switching services at certain plants engaged in the processing of corn or soybeans, and to report to the Commission the results of the investigations. There is a sharp contrast between what the Commission has done in the way of conducting an investigation respecting services at competing plants since the court below entered its decree in the case at bar, and what the Commission did in the preceding years. This gives emphasis to what this Court once said (*Inter Com. Com.* v. *Chicago, R. I. & P. Ry. Co.*, 218 U. S. 88 (p. 103) that—

> "If the problems that are presented to it (the Commission) are complex and difficult, the means of solving them are as great and adequate as can be provided."

And there is still a sharper contrast between what the Commission did in the earlier investigations in *Ex Parte 104, Part II, Terminal Services*, and the case at bar. The Commission did not in 1931 and 1932 investigate the allowances to one lone steel mill, and require the railroads serving that mill to charge for spotting services at the mill, and then stand idly by to await the filing of complaints of discrimination. The Commission investigated allowances and terminal services at many iron and steel mills, not only in the Pittsburgh district but in other districts. It entered orders dealing with

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* *Grain and Grain Products Within Western District*, 164 I. C. C. 619; *Atchison, T. & S. F. Ry. Co.* v. *United States*, 284 U. S. 248; 205 I. C. C. 301, 229 I. C. C. 9; *General Petroleum Investigation*, 171 I. C. C. 286.

those allowances and services within a comparatively short period of time (Appendix II). What was practicable and workable with respect to the steel industry was practicable and workable with respect to the corn and soybean processing industry.

Appellees took the only practicable and the only effective action within their power to remove the inequality against the Staley Company when they filed on November 10, 1939 tariffs in which they proposed to cancel the charge of $2.50 per car then being collected from the Staley Company for the placement of cars within its plant.

Appellees proposed this method of eliminating the inequality because they were convinced that when the standards established by the Commission were applied to the spotting services at the Staley plant, no justification could be found for a continuance of a charge for those services. Appellees could not find, in comparing the spotting services at the Staley plant with those at other plants, especially Staley's competitors, and on team tracks in Decatur, that the services at the Staley plant exceeded those customarily performed at other industries and on team tracks.

The method proposed by appellees for eliminating what appellants now concede is an inequality in treatment against the Staley Company was disapproved by the Commission. It does not now lie in the mouth of the Commission to contend that appellees or the Staley Company should have taken some other or different action. Having disapproved the method proposed by appellees for climinating the inequality, the only method available to appellees, we think the Commission was under the responsibility of proceeding with an investigation to determine what other means might be found to bring about an equality in treatment between the

Staley Company and other shippers having private sidings or using team tracks in Decatur, including competitors of the Staley Company.

The language used by this Court in *United States* v. *C. M. St. P. & P. R. R. Co.*, 294 U. S. 409 has equal application to the case at bar. This Court there had before it a decree setting aside an order of the Commission finding unlawful certain reduced rates on coal. This Court, after stating that the point of the Commission's decision was not that the then-existing rates were sound, but that they must be maintained even if unsound for fear of a rate war which might spread beyond control, said in part (p. 509):

> "The danger is illusory. The whole situation is subject to the power of the Commission, which may keep the changes within bounds."

This Court, after pointing out that it is not the railroad that was subject to the reproach of dealing with the matter piecemeal but that the reproach of piecemeal action was incurred by the Commission, which had not adjudged the fairness of the relation then existing between the rates, which had put off to an indefinite future the remodeling of the rate structure, and had left the Milwaukee Railroad helpless in the interval, said (p. 510):

> "* * * In brief, a schedule of lowered tariffs has been canceled though the facts that control the validity of the reduction have yet to be determined. This was not a full discharge by the Commission of an immediate responsibility. It was inaction and postponement. Responsibility was shifted from the shoulders of the present to the shoulders of the days to come."

The reproach of piecemeal action is incurred by the Commission in the case at bar. Appellees, required as

they were by the Commission's order herein to cancel the tariffs proposed by them that would eliminate the inequality in treatment, were compelled to be the means whereby the Staley Company has been left helpless in the interval. And it has been a long interval, as this record shows. It only requires a reference to the Statement in this case (p. 4) to see that there has not been a full discharge by the Commission of an immediate responsibility, that on the other hand there was inaction and postponement. The responsibility was shifted from the shoulders of the present to the shoulders of the future. It took the opinion and decree of the lower court to prod the Commission to action, but which action has not eliminated the long-existing inequality.

Appellants argue that the Commission's order was authorized by the Interstate Commerce Act (pp. 34-44). They deal at length with the right and the duty that the Commission possesses of determining under Section 1(3) of the Act what constitutes complete delivery, or where transportation begins and ends. Appellees do not dispute or challenge the exclusive jurisdiction of the Commission to determine such administrative questions. They do challenge, however, the right to determine such questions when the Commission in reaching that determination does not observe the standards that control its action, and where as a result of its failure to do so, it requires the railroads to become the medium through which an admitted inequality of treatment is imposed upon the shipper.

Appellants refer to the Commission's decision in the *Weirton Steel Co. Case,* 209 I. C. C. 445, one of the cases decided upon appeal in *United States* v. *American Sheet & Tin Plate Co.,* 301 U. S. 402, and the *Crane Company Case,* 210 I. C. C. 210, which was before the court in *In-*

*land Steel Co.* v. *United States,* 23 Fed. Supp. 291. Appellants point out that these cases involved the spotting services actually being performed by a carrier at an industry and not allowances, and arguing that these cases are controlling, they say (p. 43):

> "It can hardly be gainsaid, that if Staley is enentitled to 'free spotting service' because its competitors have not been subjected to the same charge by orders of the Commission, by the same standard, Crane is entitled to free spotting service since its competitors have not been subjected to a similar charge."

But here again appellants overlook the essential difference between the issues in the cases heretofore decided by the Commission and the courts and the case at bar. Questions of discrimination and preference were not involved in the *Weirton* and *Crane* cases, and neither of these companies has since raised any issue under Sections 2 or 3. These two cases had no such background of facts as the case at bar. Appellants refer to the fact that Judge Lindley, who wrote the opinion in the *Inland Steel Co.* case, joined in the majority opinion in the present case. This but gives further emphasis to the essential difference between the cases, a difference obviously recognized by Judge Lindley.

This Court in its recent decision in *Eastern-Central Motor Carriers' Association* v. *United States,* No. 105, October Term, 1943, decided February 7, 1944, in reversing the judgment of the lower court which had upheld a decision of the Commission rejecting certain schedules filed by the Association, said (p. 14):

> "In returning the case we emphasize that we do not question the Commission's authority to adopt and apply general policies appropriate to particular classes of cases, so long as they are consistent with the statutory standards which govern its action and are formulated not only after due consideration of

the factors involved but with sufficient explication to enable the parties and ourselves to understand, with a fair degree of assurance, why the Commission acts as it does. Cf. *United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475, 488, 489."

The Court said that it did not undertake to tell the Commission what it should do in that case, that this was not its function, that it only required that whatever result be reached, enough be put in the record to enable this Court to perform the limited task which belongs to it.

The question of what terminal services come within the legal obligation of a railroad is essentially one for the Commission. But in determining that question the Commission, to do justice, must be guided by the standards which control its action.

Appellees submit that this case must likewise be sent back to the Commission, to the end that the Commission may apply to the issues the standards laid down in the Interstate Commerce Act.

## II.

**The Commission failed and refused to apply the tests which it has laid down whereby it may be determined whether a particular service is within the scope of the railroad's legal obligation.**

The Commission not only failed to observe the standards which Congress laid down to govern its action, but it failed to observe the tests which it has developed itself to determine whether a particular switching service is within the scope of the railroad's legal obligation. It is only by the application of these standards and principles that the Commission can avoid the entry of orders that will bring about the very unjust discrimination and undue prejudice that it was the intention of Congress to prevent and prohibit by the passage of the Interstate Commerce Act.

The Commission in *United States P. & F. Co.* v. *Dir. Gen.*, 57 I. C. C. 677, said that just as there are criteria by which the reasonableness of a rate may be measured, so there are tests whereby it may be determined whether a particular service is within the scope of a carrier's legal obligation. Continuing the Commission said (p. 683):

> "* * * The customary practice generally as to carload traffic, the customary delivery service extended to the rank and file of industries in the same general district, the customary delivery service rendered to the rank and file of competing industries in the same general district, the customary delivery service rendered to competing industries in the same rate group under the same transportation rates, involving practically the same line-haul service, these are considerations pertinent to the determination of what constitutes a reasonable delivery service and the carrier's legal obligation in a particular instance. However, in testing the extent of the carrier's legal obligation as to the delivery of carload freight, two circumstances are entitled to primary consideration. One is the extent of the service involved in a typical team-track delivery; the other, the extent of the service rendered in the typical shunting of a car upon a siding of a shipper clear of the main track—the substitute for team-track delivery."

In *Studebaker Corp. Terminal Allowance*, 210 I. C. C. 137, the Commission said that the allowance paid to the industry was unlawful because (p. 139):

> "The service required in placing cars at points of unloading or loading within the plant greatly exceeds the service performed in delivering or receiving cars at other industries in South Bend, or on team tracks. Therefore, the Studebaker Corporation is unduly preferred as compared with shippers generally."

There are other cases in which the Commission has dealt with allowances or spotting services upon a record

that contained comparisons of the services rendered at the plant in question with those rendered at other plants in the same switching district or in the same general territory, including the plants of companies with which the plant under investigation was in competition.*

The most recent pronouncement of the Commission dealing with the standards that should be applied to these cases is that found in a letter dated November 17, 1943 written by Mr. Commissioner Splawn, Chairman of the Commission's Legislative Bureau, to Senator Burton K. Wheeler, Chairman of the Committee on Interstate Commerce of the United States Senate, regarding Senate Bill 1492. Mr. Commissioner Splawn said that this bill would impose a legal obligation on the line-haul railroads to spot cars at any and all loading and unloading points on the property of large industries—

> "performing service greatly in excess of that required in making simple placement on an ordinary siding or team track for other shippers in the same locality."

To what extent did the Commission through the testimony of its own employes in the case at bar compare the switching services at the Staley plant with those rendered at other industries, including competing industries, and at team tracks in the Decatur Switching District and in the same general territory? An examination of the testimony offered by the Commission's witnesses will disclose that notwithstanding the fact that they spent many weeks in investigating the spotting services performed at the Staley plant in Decatur, they made no investigation of the spotting services performed at other industries or on team tracks in the Decatur Switching District or elsewhere (R. 666-776).

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* *Snoqualine Falls Lumber Co. Terminal Allowance*, 245 I. C. C. 112 p. 114; *Celotex Co. Terminal Allowance*, 245 I. C. C. 105; *Red River Lumber Co. Terminal Allowances*, 256 I. C. C. 379.

The testimony of appellees' operating officers shows that the switching of a given number of cars at the Staley plant is less burdensome and less costly than the switching of the same number of cars at other industries and team tracks in the Decatur Switching District (R. 849-853, 535-537, 405-409).

The Commission made no effort to rebut or refute this testimony. It stands without any challenge in the record. It reflected the application of the very principles that the Commission has announced in the cases cited in the earlier portion of this section: a comparison of the switching services at the plant under investigation with those rendered at other plants and on team tracks in the same locality.

The presiding Commissioner thought that some of these questions were hypothetical in nature (R. 851, 853). But these comparisons reflected the very comparisons called for by the tests established by the Commission.

The Commission makes no mention of these comparisons in its report. It erroneously assumed that even where issues under Sections 2 and 3 presented themselves it could confine its consideration of the facts to those dealing with spotting services at the plant under investigation. The Commission, moreover, was not in any position to determine whether the spotting services at the plant were excessive or were beyond the carrier's legal obligation until it made some comparison of those services with the services ordinarily and customarily given other shippers in the Decatur switching district and competitors of the Staley Company in Decatur or elsewhere.

In reviewing this testimony appellees are sharply reminded of what the Commission said in its report in *Car Spotting Charges*, 34 I. C. C. 609 (p. 616):

> "The mere size or complexity of the industry is not controlling in determining whether or not the line-haul rate covers the receipt or delivery of freight at the door of the plant. The service involved in the placement of cars for loading or unloading at an isolated industry to which a single spur leads may be as great as that rendered in the placement of cars for loading or unloading in a large plant having an intricate system of interior tracks. Indeed, there is testimony tending to show that by reason of greater density of traffic and greater tonnage the cost of spotting at the larger industries is less per car than at the smaller industries."

In *United States P. & F. Co.* v. *Dir. Gen.*, 57 I. C. C. 677, the Commission further said (p. 684):

> "Where an industry is accorded the equivalent of the delivery service rendered to the majority of shippers in the same district which receive other team-track delivery or simple switching delivery, there is no basis for a finding that the line-haul rates contemplate an additional spotting service at such industry. * * *"

While appellees are criticized by appellants for assailing the Commission's order, this quotation epitomizes the reasons why appellees have challenged the Commission's order of May 6, 1941. To approach these questions as appellants have approached them in their brief, to insist that the Commission in passing upon the issues in such a proceeding as the present one need not go beyond a bare description of the physical services connected with the switching operations at the plant under investigation, and can ignore the services customarily and ordinarily given at other plants and on team tracks in the same switching district and in the same territory, is bound to bring about undue prejudice and unjust discrimination.

The Commission cannot determine whether the spot-

ting services at the Staley plant, taking that plant as a whole, or at particular locations within the plant, exceed the equivalent of team-track deliveries in the same locality or exceed the customary delivery services extended to the rank and file of industries in the same general district or in the same general rate group, unless it makes the comparisons called for by these standards which it itself has evolved. The employes of the Commission in their testimony failed to make any such comparisons, and the Commission ignored the unrefuted testimony offered by appellees' operating officers in which such comparisons were made. Appellees have no other standards to apply except the very ones that the Commission has made but which it has ignored in this proceeding. If some new standard is to be applied, then the Commission ought frankly to discard the standards laid down in these decisions and announce to the railroads and to the shippers what new standards will control. (See Mr. Commissioner Mahaffie's dissenting opinion, quoted on page 14 of this brief.)

Appellees referred in their Statement (p. 4) to the testimony offered by the traffic officers of competing industries respecting the terminal services rendered at their respective plants (R. 544-572). The standards laid down by the Commission call for comparisons of the kind embraced in the testimony of these traffic officers. It brought out in bold relief the existing inequality in treatment and again brought home to the Commission that inequality. The Commission, nevertheless, cast this testimony aside (R. 42).

Appellants themselves say in their brief (p. 13) that

> "The standard laid down is what has long been termed the 'equivalent of team-track or simple switching delivery,' but it should be noted that the Commission defines or specifies service that is to be regarded as in excess thereof."

But, as pointed out in the decisions that appellees have just reviewed, if injustice is to be avoided, if inequality in treatment is to be prevented, and if the fundamental purposes of the Act are to be carried out, there must be a comparison of the spotting services at a given plant with the spotting services that are customarily and ordinarily performed in switching other industries and team tracks in the same locality and in the same rate group. The standard of switching services is not found in words but in action. "Team-track delivery" is not merely a phrase, a combination of words. The railroads have team tracks in every community. The railroads from time immemorial have performed spotting services on team tracks and at industries without any charge in addition to their line-haul rates.

It cannot be said that the Commission would have reached the decision it did in the case at bar had it applied to its own tests, and had understood that when issues of discrimination and preference present themselves, it is only by the application of those tests that a standard of comparison in a given locality can be evolved, and discrimination and preference avoided.

## III.

### The Commission's Order Is Arbitrary.

**An admitted inequality in treatment existing for a period of six years cannot be said to be a temporary inequality.**

The lower court in its conclusion of the law found, among other things, that the order in question is arbitrary, unjust, and unreasonable (R. 139). We agree with appellants that a finding that the order is unjust and unreasonable is equivalent to holding that the order is invalid because it is arbitrary.

Appellees' statement of the case (p. 4) shows on its face the arbitrary action of the Commission that has

characterized this proceeding ever since 1937, arbitrary action which culminated in the Commission's order of May 6, 1941, here under attack.

Appellees were first required to impose a spotting charge upon the Staley Company on June 15, 1937, pursuant to the Commission's findings in *A. E. Staley Mfg. Co. Terminal Allowance,* 215 I. C. C. 656. The Commission's order of May 6, 1941, requires appellees to continue this charge in effect. All during this period of time and up to July 31, 1943, the Commission sat by with folded arms, in spite of the fact that *first,* the Staley Company, by numerous petitions, *second,* appellees by tariffs, which were suspended by the Commission in the case at bar (*I. & S. Docket No. 4736, Switching Charges at Decatur, Ill.*), and *third,* both parties, by testimony, briefs and arguments before the Commission, brought home to the Commission the inequality in treatment to which the Staley Company had been subjected during all these years.

It was not until July 31, 1943, that the Commission instituted an investigation with respect to the terminal services at certain plants in Decatur and Chicago, an investigation that was responsive not to anything that the Staley Company or appellees had done or said, but to the opinion and decree herein of the lower court. Appellees, notwithstanding the pendency of this investigation, are required to continue the spotting charge against the Staley Company.

The lower court was right when it said in its opinion (R. 137):

> "* * * Where one industry of many in a highly competitive field is singled out and subjected to a tariff not imposed on any other and under compulsion of the order of the Commission obliged to pay such tariff for a number of years without relief and without action to establish like tariffs for competing

> industries, the order becomes an instrument of destruction. Such treatment long continued could only mean extinction of the industry thus affected. So surely as 'the power to tax is the power to destroy,' so is the power of rate regulation when applied inequitably."

Appellants in contending that the Commission's order is not arbitrary, assume that the Commission came to the matter of spotting charges at the Staley plant for the first time on May 6, 1941, the date of its report in the case at bar. The inequality in treatment against the Staley Company was brought to the Commission's attention not once but many times since October 27, 1937. The Commission all through the years had notice of the inequality in treatment, but nevertheless did nothing about the matter.

Appellants admit the inequality in treatment that appellees have been required to mete out to the Staley Company over the years under the orders of the Commission (pp. 66, 80). They stamp the inequality as a "temporary" one, although it has been continued over a period of more than six years. We submit that this admission of appellants carries with it a recognition of arbitrary action on the part of the Commission over the years.

Appellants in that section of their brief in which they contend that the Commission's order is not arbitrary, have scattered many unsound arguments that are not pertinent to a consideration of that question. We shall deal with some of them.

To sustain the decree herein would not prescribe impossible requirements precluding the removal of rebates as contended for by appellants (p. 81). Nor is there anything in the opinion of the lower court or in the position taken by appellees that would place an impossible burden

and task upon the Commission in the administration of the Act. That this is so is shown by the fact, as heretofore pointed out, that the Commission, within a comparatively short period of time, and after an investigation extending over several years, entered orders dealing with allowances and terminal services at iron and steel mills. Thus one industry was not placed at a disadvantage with another in the same field and subjected to unequal treatment. The investigation, moreover, that the Commission found it possible to make on July 31, 1943, respecting the switching services performed at plants of the Staley Company's competitors, could have been instituted years ago. The names of these competitors were not suggested to the Commission for the first time by the Court's opinion. They were first brought to the attention of the Commission in a petition filed by the Staley Company on March 16, 1938 (R. 100-101), more than five years before the Commission instituted this investigation.

The appellees rely upon language of this Court in *Union Stock Yard Co.* v. *United States,* 308 U. S. 213 (pp. 223-224) in support of their contention that the view urged by appellees would impose an impossible task on the Commission. This Court there said that the issue to be resolved was whether the service rendered by the Stock Yard Company at Chicago was within the jurisdiction of the Commission, but as to this issue the practices by others at other stock yards were irrelevant and their bearing on the administrative construction of the statute too remote and indecisive to compel a burdensome inquiry into collateral issues.

Obviously this is a wholly different case from the case at bar. There is no suggestion that there was any competition between the Stock Yard Company and stock yard companies at other points. The case was not one

where the Commission had imposed one charge upon one company and over a six-year period, in the face of the matter having repeatedly been brought to its attention, had taken no steps to investigate the services at competing plants in the same switching district and in the same general terrtiory. The case involved a question of jurisdiction and not questions of rate relationships between competitors and inequality in treatment in those relationships.

The question in the case at bar is whether the Commission somewhere along the line and some time in the course of the years, long before July 31, 1943, should not have exerted itself and exercised the power that it has of investigating the facts to determine how this inequality in treatment should be removed. The Commission rejected the method proposed by appellees of removing the inequality in treatment, but took no steps towards making such further investigation of the facts as would enable the Commission to approve some other method of removing the inequality.

Appellants state (p. 66) that the effect of the ruling below alone is to permit a continuance of a recognized variation from published rates prohibited by Section 6(7) until the Commission can make a decision as to all other like rebates and stop them simultaneously. Appellants have overlooked the fact that while the Commission made its investigation of allowances and spotting services at iron and steel mills in 1931 and 1932, it was not until May 14, 1935, that it began to hand down decisions dealing with allowances and spotting services at particular industries. The variation from the published rates continued all during this period of time. Appellants' arguments, therefore, in the case at bar are belied by the Commission's approach to this problem in the years from 1931 to 1936.

The Commission, moreover, cannot possibly determine whether spotting services at a given plant are beyond the carrier's legal obligation and therefore constitute a departure from the published rate prohibited by Section 6(7) until it has given heed to the provisions of the statute which it is empowered to enforce, and until it has applied the tests which it has laid down to determine whether spotting services at a given plant come within a carrier's legal obligation.

Appellants state (p. 76) that it becomes apparent that the real objective in this action is not to insure equality of charges to competing industries but rather to avoid such a charge as to all. This is a wholly erroneous statement. The objective of this action is to prevent these appellees from being made the instruments of oppression and inequality among shippers.

Continuing, appellants say (p. 77) that in such a manner the appellees and industries located on their lines would obtain a competitive advantage over other carriers and other industries where, under final judicial decisions, similar free services have already ceased. But appellants have wholly ignored the fact that no other corn or soybean processing industry has been required by the Commission to pay such a charge as appellees are required to make against the Staley Company. The Staley Company for over six years has been singled out for special and inequitable treatment and has been required, in the face of repeated protests, to pay a charge that no other competitor pays.

Appellants insist in one breath that appellees claim that if the Staley Company is required to pay a spotting charge, its competitors must also be required to do so, and in the next breath that the real objective in this action is to avoid the assessment of a spotting charge as to all industries, including all industries that compete

with the Staley Company regardless of the kind and character of the services involved. Whether the Staley Company or any other industry should pay a spotting charge can only be determined by an investigation in which the Commission applies the standards that govern its action and the principles that it itself has announced.

Appellants further state (p. 70):

> "* * * Evidence as to one plant obviously could not disclose operating conditions at another plant. Comparison of similarity between two plants affords no practical basis for decision, since each case must be heard on its own record, with a full hearing and opportunity to submit evidence."

But comparisons of operating conditions at other plants and team tracks in the same district would disclose the services that are ordinarily and customarily performed by the railroads and would therefore afford the only practical basis for decision. They would provide, as the Commission has so many times held, some standard by which the services at a given plant could be measured.

The procedure followed by the Commission in this case, under which the Commission selects one industry in the field, requires the railroads to impose a spotting charge upon that industry and then over a period of six years take no steps to investigate other industries in the same field, notwithstanding complaints of inequality, would inevitably lead both the Commission and the carriers into a bottomless pit of litigation. This procedure is the very embodiment of arbitrary action.

## IV.

**The Commission recognized the justice of the lower court's opinion when it instituted an investigation respecting the switching services at the competing plants specifically named by that court.**

In the preceding sections of this brief we have shown that the Commission failed to observe the statutory standards which govern its action and that it failed to apply the principles that it has established whereby it may be determined whether a particular service is within the scope of a railroad's legal obligation. These considerations require an affirmance of the lower court's decree.

But there is another reason why the lower court's decree should be affirmed: the Commission itself has recognized the inherent justice of the opinion and decree of the lower court.

The opinion of the lower court was handed down on June 10, 1943 (R. 134) and the final decree was filed on July 14, 1943 (R. 143). The appellants have set out in the appendix to their brief an extract from the Commission's last annual report, in which the Commission referred to the case at bar and stated that it was making an investigation of the alleged preferred services. This investigation was instituted by a notice of the Commission dated July 31, 1943, in *Ex Parte 104, Part II, Terminal Services,* which notice assigned that proceeding for hearing with respect to the terminal services at three plants in Decatur and one at Argo, Illinois. These are the very plants named by the court in its opinion (R. 136) as competing plants at which no charge is made for switching service.

What prompted the Commission to institute this investigation respecting terminal services at these four plants?

Appellees have heretofore quoted the court's statement (R. 137) that where one industry of many in a

highly competitive field is singled out and subjected to a tariff not imposed on any other, and is required by an order of the Commission to pay such a tariff charge for a number of years without relief and without action to establish like tariffs for competing industries, the order becomes an instrument of destruction.

And the lower court in one of the concluding paragraphs of its opinion said (R. 139):

> "* * * So far as we know, this precise question has never been before any Court, but with a firm belief in the doctrine that no wrong shall exist without a remedy it seems to us that the Commission must meet the problem head on and devise some over-all method of dealing with competitive industries that will eliminate the injustice here so apparent. Otherwise, the purpose of the Act will be thwarted and the resultant inequities will outweigh the evils sought to be corrected. See *U. S.* v. *C. M. St. P. & P. R. R. Co.*, 294 U. S. 499."

Thus the Commission at this late date, after a lapse of more than six years, has instituted an investigation to determine whether unjust discrimination and undue prejudice exist as a result of its decision requiring the imposition of a spotting charge against the Staley Company. But the investigation instituted by the Commission under its notice of July 31, 1943 is simply responsive to the court's opinion and is a recognition that the court is right in the position it took.

Indeed, the Commission in commenting upon the case at bar in its Fifty-Seventh Annual Report, referred to by appellants in the appendix to their brief, said (p. 59):

> "* * * In attacking our order in the lower court, the industry contended that it was unjustly discriminatory and unduly prejudicial to require it to pay a spotting charge when its competitors receive such service from the carriers without charge. We are investigating all such alleged preferred services

with a view to determining whether the service performed at such plants by the carriers is in excess of that which the carriers are obligated to perform under their line-haul rates."

The Commission here plainly recognizes that the course it has pursued from the very beginning respecting the case at bar has been wrong, and that when an issue under Sections 2 and 3 is raised, the Commission cannot treat the switching services at a given plant as if they were performed in a vacuum, and bore no relationship to the services performed at competing plants in the same locality and in the same rate group. The Commission here recognizes that Sections 2 and 3 of the Act exist, and that these sections are just as binding upon the Commission in a general investigation instituted on its own motion as they are upon railroads.

But the Commission in instituting this further investigation has not retroactively or presently cured the injustice imposed upon the Staley Company by the assessment of a spotting charge required to be made by appellees against that Company through all these years. The Commission would now require appellees to continue this spotting charge while it makes the investigation it should have made years ago when issues under Sections 2 and 3 were first brought to its attention.

Appellees submit that it does not now lie in the mouth of the Commission to challenge in this Court the validity and justice of the lower court's opinion, when the Commission has proceeded to make the very investigation of switching services at competing plants called for by that opinion.

We submit that the Commission has by its action plainly recognized the truth and justice of the opinion and decree of the District Court and that it has, therefore, impliedly waived any right to challenge the validity of that decree in this Court.

## V.

**The lower court recognized that it is the function of the Commission to determine administrative questions. The court left those questions to be determined by the Commission but in accordance with the statutory standards.**

Appellants argue that the lower court erred in deciding administrative questions not decided by the Commission. They cite many cases that are representative of the long line of cases decided by this Court, holding that administrative questions are to be determined by the Commission and not by the courts.

An examination of the lower court's opinion (R. 134-139), its Findings of Fact and Conclusions of Law (R. 139-143), will disclose that the court recognized that the questions involved were essentially administrative questions for the determination of the Commission, but that the Commission in passing upon those questions must observe the statutory standards which govern its action.

If the lower court's opinion had the effect and the reasoning that appellants ascribe to it, the Commission would find its hands tied in any future investigation it might be called upon to make respecting the switching services at the Staley plant and at the plants of the Staley Company's competitors. That the Commission's hands have not been tied by the court's opinion and decree is shown by the fact that following the entry of the decree it instituted an investigation respecting the spotting services being rendered at plants of the Staley Company's competitors specifically named in one of the paragraphs in the court's opinion (R. 136).

Appellants state (p. 59) that the lower court found two facts, neither of which was decided by the Commission and neither of which was necessary or required under previous decisions of this Court, to render the re-

port and order herein valid: (1) that the switching situation at the Staley plant was similar to that at nearby and competing industries; and (2) that discrimination and preference resulted against the Staley Company because of the order.

Why does the Commission feel that it was not called upon to decide these two facts? It was because it erroneously assumed that as a matter of law it was not required to give consideration to evidence showing the switching services rendered on team tracks or at other industries in Decatur or at competing plants. It mistakenly believed that it could confine its consideration of the facts to those which pertained only to the services rendered at the Staley plant, notwithstanding the issues under Sections 2 and 3 that were specifically brought to its attention not once, but many times, and the fact that under the principles established by the Commission it could not fairly determine whether the spotting services at the Staley plant were beyond the carrier's legal obligation unless it made some comparison of those services with the services customarily rendered on team tracks and at other industries in the same switching district and at the plants of the Staley Company's competitors.

The Commission took this position because it considered itself free from the duty of applying Sections 2 and 3 and from making the comparisons called for by its own decisions. The lower court simply considered evidence that the Commission mistakenly refused to consider.

Let us examine the lower court's approach to these questions and the court's conclusions. The court, after referring to the Commission's statement that the evidence respecting spotting services at other plants did not satisfactorily show that the circumstances and conditions under which the spotting was performed were

substantially similar to those at the Staley plant, but that if it did, it would only show the probability of the existence of unlawful practice and the need for investigation, said (R. 137):

> "It appears that the Commission was of the belief that each case must stand on its own bottom and be considered by the Commission independent of any other and without relation to the probable inequities bound to flow from an order not applicable to all similarly situated. We think this too narrow a view. * * *"

And the court after pointing out that where an industry is singled out and obliged to pay such a tariff charge for a number of years without relief, and without action by the Commission to establish like tariffs for competing industries, the order becomes an instrument of destruction, said (R. 137-8):

> "We think the finding of the Commission that the practice of furnishing spotting service to Staley by the carriers would accord Staley more favorable treatment than others, not supported by the evidence. The substantial evidence indicates quite the contrary. It indicates that under the present order Staley is being discriminated against. It thwarts the real purpose of the Commission to remove discrimination in certain instances where carriers may have accorded a preferential service to one customer over another. The order here obliges the carriers to discriminate against Staley, and, as they assert against their will, and in violation of Sections 2 and 3 of the Act."

The court then made a distinction which appellants overlooked between this case and the cases heretofore decided by this Court involving allowances and spotting services at various plants.* It may here be said that this Court in those cases was dealing with a number of

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* *United States* v. *American Sheet & Tin Plate Co.*, 301 U. S. 402; *United States* v. *Pan-American Petroleum Corp.*, 304 U. S. 156.

like orders in relation to a group of competing industries. No question of one industry having received a different treatment from all others was before the court.

The court, in short, examined the evidence in this record which the Commission refused to consider, and found that this evidence showed that the Staley Company was being subjected to an inequality in treatment. No one can examine the history of this litigation and the facts and avoid reaching a similar conclusion. The appellants concede the existence of this inequality (pp. 66, 80).

But the lower court, recognizing that the fundamental issue was one for the determination of the Commission, made no order that was conclusive upon the parties, that spoke with finality, or that substituted the court's judgment for that of the Commission. It said, as we have just seen, that with a firm belief in the doctrine that no wrong shall exist without a remedy, it seemed to it that the Commission must meet the problem head-on and devise some over-all method of dealing with competitive industries that will eliminate the injustice here so apparent.

If the decree below is affirmed the duty and the right that the Commission has to pass upon the questions involved can in no respect be affected. But the Commission will have to bear in mind that it sits to administer not one section of the Act but all the sections thereof, and that when issues are raised thereunder it may not ignore them and require the railroads to impose over many years an inequality in treatment upon one shipper.

Appellants state that in effect the court below has found on the facts that the actual conditions of operation at the plants of the Staley Company's competitors are such as to require the assessment of a spotting charge at those plants if a spotting charge has to be imposed upon the Staley Company. The court has made no

such finding. The court has said to the Commission that it must devise some method of dealing with competitive industries that will eliminate the injustice here so apparent.

Appellees do not contend, as suggested by appellants (p. 62), that the Commission could impose a spotting charge at any plant in the absence of a fair hearing for all the parties.

Appellants further state (p. 62) that the plants competing with the Staley Company were not before the Commission in any proceedings then pending, and that testimony concerning the situation at such plants was merely collateral and irrelevant to a determination of the issues at the Staley plant. But the point is that the Commission was in no position to determine, in justice to all the parties, whether the spotting charge against the Staley Company should be continued until it had compared the spotting services at the Staley plant with those at other plants and on team tracks at Decatur and at other points in this same general territory where the competitors of the Staley Company are located, and until it had satisfied itself, in the light of these comparisons, that the imposition of a spotting charge against the Staley Company would not result in violations of law.

Appellants state (p. 63) that the complaint and opinion below show (R. 11, 137, 138) that the "preference and discrimination" alleged and found were by comparing the Staley situation with the situations of other shippers in the same locality and on the lines of appellees, or in direct competition with the Staley Company. Appellants then state (pp. 63-4):

> "* * * Statutory provisions against discrimination and preference do not contemplate such a limited

comparison between a shipper and his neighbors or competitors. Discrimination and preference must be found by comparing any preferred shipper to another, even though separated by the continent and engaged in an entirely noncompetitive business. An allowance or free service condemned by the Act constitutes a rebate whether extended to a favored steel industry or a food-processing company, to a lumber company in Oregon or to a stockyard in Chicago. * * *"

Appellants must know that this is a wholly inaccurate statement of the law respecting discrimination and preference. When it comes to questions of discrimination and preference, questions that involve essentially a relationship between shippers, it is well established that one railroad cannot be held responsible under the Act for discrimination or preference beyond its control and within the control of other railroads. As Mr. Justice Brandeis put it in *Central Railroad Co.* v. *United States,* 257 U. S. 247 (p. 259):

> "What Congress sought to prevent by that section (Section 3) as originally enacted, was not differences between localities in transportation rates, facilities and privileges, but unjust discrimination between them by the same carrier or carriers. Neither the Transportation Act, 1920, * * * nor any other earlier mandatory legislation has changed in this respect, the purpose or scope of Section 3."

And this Court in the more recent case of *Texas & Pacific Ry. Co.* v. *United States,* 289 U. S. 627, said (p. 650):

> "A carrier or group of carriers must be the common source of discrimination—must effectively participate in both rates, if an order for correction of the disparity is to run against them."

This construction of the law simply gives further emphasis to the erroneous theories of law that have perme-

ated the Commission's approach to the issues before it in this case and that have been responsible for the errors into which it has fallen. It can purge itself of those errors only by following and observing the standards which must govern its actions.

Appellants conclude this section of their brief by a reference (p. 64) to that portion of the lower court's opinion in which it held that the question of discrimination was not before this Court in the *American Sheet & Tin Plate Company* and the *Pan-American Petroleum Corporation* cases (301 U. S. 402 and 304 U. S. 156), and that in those cases the Court was dealing with a number of like orders relating to a group of competing industries. Appellants add this comment (pp. 64-5):

> "* * * However, neither the Commission nor the Court, has in these *Ex Parte 104* supplemental reports, dealt with a number of like orders in relation to a group of competing industries. * * *"

But a reference to the cases decided by the Commission, classified according to industries, shows that whatever may have been the intention of the Commission, the actual result was to deal, within a comparatively short period of time, with the terminal services rendered to a group of competing industries. This is shown in Appendix II to this brief, in which appellees have classified according to the kind of business all the cases decided by the Commission since May 14, 1935, the date of the Commission's report in *Propriety of Operating Practices —Terminal Services*, 209 I. C. C. 11.

Appellants' argument suggests that appellees contend that the spotting services now being performed at the Staley plant are lawful, and that the spotting services at the plants of the Staley Company's competitors are in every respect lawful. But appellants here missed the

point. The point appellees make is that the Commission is not in a position to pass intelligently and fairly upon the issues respecting the spotting services at the Staley plant or other plants until it gives heed to Sections 2 and 3 of the Act—until it passes upon the issues in the light of the standards laid down in the Act, as well as the standards which it itself has developed.

What the lower court did by its opinion and decree was really to send this case back to the Commission to the end that the Commission may reexamine the issues and the facts in the light of the standards laid down in the Interstate Commerce Act that control its action and in the light of the principles that it has itself developed in these cases. The lower court no more invaded the jurisdiction of the Commission than did this Court in *United States* v. *Carolina Carriers Corp.*, 315 U. S. 475; *City of Yonkers* v. *United States* (decided January 3, 1944) and *Eastern Central Motor Carriers Assn.* v. *United States* (decided February 7, 1944), in which cases this Court set aside orders of the Commission in proceedings because the Commission had failed to comply with the statutory standards which control its action. And in each of these cases this Court took pains to point out that it expressed no opinion on the problems which were essentially for the Commission to pass upon, problems which involved, to use the language of this Court in *United States* v. *Carolina Carriers Corp.*, *supra*, not only "a weighing of evidence but the exercise of an expert judgment on the intricacies of the transportation problems which are involved."

## VI.

**Only when the statutory standards have been applied can the question be reached whether the findings are supported by evidence.**

**Certain subsidiary findings of the Commission are not supported by facts more particularly stated in the report, are without support in the evidence, and are contrary to the evidence.**

Appellants argue that the Commission's order is supported by substantial evidence (pp. 44-54). They state (p. 47) that except as to the Burwell Yard appellees accept as supported by evidence all the other findings of the Commission as to actual conditions and operations. Appellees make no such acceptance of all the other findings of the Commission.

Appellants wholly miss the point. The basic finding in a case of this kind is, of course, that which specifies where transportation begins and ends. Conclusion No. 2 in the Commission's report states (R. 43) that all services between the yards and points of loading or unloading within the Staley Company's plant area are plant services for the Staley Company and not common carrier services covered by the line-haul charges of the respondent carriers. But no one is in a position to determine whether this basic finding is supported by the evidence, and indeed, whether the Commission would have made such a finding, until it is made clear that the Commission applied the statutory standards which govern its action. This Court stated this point well when it said in *United States* v. *Carolina Carriers Corp.*, 315 U. S. 475, (p. 489):

> "Only when the statutory standards have been applied can the question be reached as to whether the findings are supported by evidence. That is why we cannot say that the Commission would be justified in placing the same restrictions on the certificate in this case had a correct construction of the Act been taken."

It cannot be said that the Commission would have been justified in reaching the conclusion it did respecting spotting services at the Staley plant had a correct construction of the Act been taken.

There is one finding of fact and a conclusion contained in the Commission's report, however, that are not supported by facts more particularly stated in the report and are without support in the evidence and are contrary to the evidence, which we bring to the Court's attention. We do this for the reason that they bring out the perfectly formal and perfunctory way in which the Commission has dealt with the case at bar. The Commission has wholly ignored the very substantial difference between the issues in the case at bar and the issues in the cases decided by the Commission which were before this Court in the *American Tin Plate Company* and the *Pan-American Petroleum Corporation cases* (301 U. S. 402 and 304 U. S. 156).

When the Commission came to make its findings in the case at bar, it simply turned to the findings in these earlier cases, treating them as binding precedents, and used them even though the facts and issues in the case easier merely to copy what it had done in earlier cases, The Commission in short failed to bend its mind to the facts and to the issues in the case at bar, finding it much easier merely to copy what it had done in earlier cases, where the facts and the issues were wholly different.

The Commission in its report made several findings of fact, No. 5 of which states that the services between the interchange tracks, described in the report, and points of loading and unloading within the plant area, are in excess of those rendered shippers generally in the receipt and delivery of traffic on team tracks or industrial sidings and spurs (R. 42-43). This finding is described by the Commission (R. 42) as a "principal basic fact."

The finding that the switching services at the Staley plant are in excess of those rendered shippers generally in the receipt and delivery of traffic on team tracks or on industrial sidings involves a comparison of services which must have as its base not only a consideration of what services the Staley Company receives, but a consideration of the services rendered by appellees or by any other railroads, for that matter, in the receipt and delivery of traffic on team tracks or on industrial sidings.

This Court in *United States* v. *C. M. St. P. & P. R. R. Co.*, 294 U. S. 499, upholding the decree of the lower court setting aside an order of the Commission, said (p. 506):

> "The statement in the second of these paragraphs that the proposed rates would be 'unreasonable' must be read in the light of the report as a whole, and then appears as a conclusion insufficient as a finding unless supported by facts more particularly stated. Cf. *Florida* v. *United States*, 282 U. S. 194, at p. 213; *Southern Pacific Co.* v. *Inter Com. Com.*, 219 U. S. 433, 449. * * *" *

There are no facts more particularly stated in the Commission's report in the case at bar which support the finding that the switching services at the Staley plant are in excess of those rendered shippers generally in the receipt and delivery of traffic on team tracks or industrial sidings.

No facts were more particularly stated in the report to support that finding because there were no facts in the record to support such a finding. The Commission's witnesses, as we have seen, confined their testimony to a description of the switching services at the Staley plant. They made no effort to compare the switching services at the Staley plant with the switching services rendered by appellees or by other railroads on team

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* Attention is also directed to *Florida* v. *United States*, 282 U. S. 194, p. 213.

tracks or industrial sidings at Decatur or elsewhere in this same general territory. The uncontradicted testimony offered by the officers of appellees shows that the services rendered shippers by appellees at Decatur and at all other points on their lines include the services connected with the placing of cars within the plant areas, and that no separate charge is made by appellees for such terminal services performed by them at Decatur or elsewhere over and above their line-haul rates, except the charge that they have been required to make against the Staley Company.

The Commission referred in Finding of Fact No. 5 to the services rendered generally in the receipt and delivery of traffic on team tracks. The testimony of appellees' operating officers that stands without any challenge or contradiction in the record, shows that the transportation services connected with the placing of cars within the Staley plant are less burdensome and less expensive than the placement of cars on team tracks in Decatur served by appellees (R. 404-405, 531-538, 849-852).

An examination of the record therefore not only shows that it is devoid of any facts which sustain the Commission's finding, but that the finding is contrary to the uncontradicted evidence in the record.

The testimony of the operating officers of appellees respecting the switching services rendered on team tracks and at other industries in Decatur takes on a greater significance when we bear in mind the many decisions of the Commission in which it has held that whether a particular service at a plant is within the scope of a carrier's legal obligation depends upon whether that service is in excess of that performed in single switch or team track delivery in the same general district or in the same general rate group. These cases are discussed on page 45 of this brief.

The Commission in its Conclusion No. 3 finds that the performance by appellees, without charge in addition to the line-haul rates, of switching services within the Staley plant, would result in the Staley plant receiving a preferential service not accorded to shippers generally. The use by the Commission of the word "preferential" was not fortuitous. The word "preferential" is a word of art. Plainly the Commission was here reaching a conclusion under Section 3 of the Act, which prohibits undue preference and undue prejudice. Questions of undue preference and prejudice involve questions of relationship. If one shipper is unduly preferred, another shipper must be unduly prejudiced. The Commission itself has many times said * that discrimination under Section 3 to be undue must ordinarily be such that the prejudice arising out of it against one party is a source of advantage to the other alleged to be favored, and that generally a competitive relationship between the commodities must appear.

One would naturally expect, therefore, that in the Commission's report would be found a list of those shippers, competitors of the Staley Company, who would be unduly prejudiced if cars were placed within the Staley plant without any charge in addition to the line-haul rates. The Commission's report of May 6, 1941, does not undertake to state who the shippers are, or where they are located, who compete with the Staley Company and who would be unduly prejudiced if cars were placed within the plant of the Staley Company without any additional charge.

The reason for this omission is plain. The record contains no facts that would enable the Commission to name

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* *Board of Trade of Chicago* v. *A. T. & S. F. Ry. Co.*, 29 I. C. C. 438, and cases cited; *California Walnut Growers' Assn.* v. *A. & R. R. R. Co.*, 50 I. C. C. 558, 568; *Boston Wool Trade Assn.* v. *Dir. Gen.*, 78 I. C. C. 341, 345.

any competitors of the Staley Company served by appellees or by any other railroad who would be prejudiced if cars were placed within the Staley plant without the impostion of a switching charge in addition to the line-haul rates.

Appellants have not pointed out a line or a section in the Commission's report of May 6, 1941, that lends any support to Finding of Fact No. 5 or Conclusion No. 3. Appellants state that abundant evidence to support this finding and conclusion is contained in those parts of the record in *Ex Parte 104, Part II, Terminal Services,* which are not here before this Court, parts which deal with the switching sevices performed by other railroads at other plants a decade or more ago.

That no such evidence exists is shown by the fact that the Commission did not set out in its report of May 6, 1941 this "abundant" evidence. It made no reference to it, and made no such comparisons as would support these findings. A cursory examination of the Commission's report of May 6, 1941 will show that it was confined to a discussion of the spotting services at the Staley plant, with no reference whatever to such spotting services at other plants on other railroads as might have been developed by the record in *Ex Parte 104, Part II, Terminal Services.* Appellees deal in a succeeding section of this brief with the question whether the record introduced in the lower court was sufficient for the purposes of this case.

If the time has come when the Commission can make what it calls basic findings and conclusions upon which it predicates its order, and omit in its report any statement of the facts which support those basic findings and conclusions, then the Commission has effectively removed its order from the possibility of any fair or adequate review by the courts.

Appellants contend (p. 48) that Conclusion No. 3 is merely a statement of a legal fact and requires no evidentiary support, that once having established a violation of Section 6(7) of the Act, a "preferential service" necessarily flows. This argument is unsound. Violations of Section 6(7) by the giving of rebates are one thing; unjust discrimination in violation of Section 2 and undue prejudice in violation of Section 3 are wholly different things. A concession, or a rebate, may or may not result in unjust discrimination and in undue prejudice. Whether it would so result would depend upon the particular facts in the particular case.

A reference to the decisions of the Commission which were upheld by the Supreme Court, dealing with allowances to warehouse companies, and to the rental of warehouse space at less than cost, in which cases the Commission made findings not only under Section 6(7) but under Sections 2 and 3, shows that parties were present before the Commission complaining that the practices of the carriers resulted in discrimination to them and offered testimony in support of this contention.*

When the Commission in these cases makes findings in which the word "preferential" appears, a word clearly taken from Section 3, it must be deemed to have used that word as a word of art. Unjust discrimination under Section 2 and undue preference under Section 3 imply comparisons and relationships not of a general nature but of a specific nature. The phrases "unjust discrimination" and "undue prejudice" used in an order of the Commission cannot possibly be deemed to be merely statements of a legal fact depending upon a finding under another Section of the Act. Conclusion No. 3 stands alone. It must be deemed to be something more

* *Gallagher* v. *Pennsylvania R. R. Co.*, 160 I. C. C. 563; *Merchants' Warehouse Co.* v. *United States*, 283 U. S. 501; *Propriety of Operating Practices—New York Warehousing*, 198 I. C. C. 134, 216 I. C. C. 291; *B. & Q. R. R. Co.* v. *United States*, 305 U. S. 507.

than a mere glittering generality inserted in the report as a makeweight.

Appellants argue that the decision in *United States* v. *American Sheet & Tin Plate Co.*, 301 U. S. 402, is controlling on the point. An examination of appellees' brief in that case, considered in connection with what the court said (p. 406), shows that the point we are making is entirely different. The fundamental argument made by the appellees in the *American Tin Plate Company* case on this point was that the Commission's findings were insufficient and that to support a cease and desist order the Commission must make necessary *quasi judicial* findings of fact that the rate or practice complained of was unreasonable, or unjustly discriminatory, or unduly preferential.

The point appellees make is that the Commission in the case at bar made certain basic findings and conclusions upon which it bottomed, at least in part, its order, but that there are no facts more particularly stated in the report that afford support for those findings and conclusions, and that there is, moreover, no evidence in the record to support them. The evidence is the other way. This was the conclusion reached by the lower court (R. 143).

## VII.

**The record before the lower court includes all the testimony offered before the Commission at the hearings involving switching service at the Staley Company's plant.**

**The Commission in its report of May 6, 1941 in the case at bar makes no mention of any facts other than those contained in that record.**

Appellants argue (p. 54) that in deciding that the Commission's Conclusion No. 3 as to "preferential service not accorded shippers generally" (R. 43) was unsup-

ported by evidence, the lower court based its decision upon a partial record.

Appellants refer (p. 56) to the principle that Courts may review orders of the Commission to see whether the evidence supports the findings only when the whole record is before the Court, since the part of the record not before the Court may provide the needed support. Appellees have no quarrel with this principle.

The fact of the matter is that there was actually a more complete record before the Court than was necessary for the determination of the issues presented. Appellees' complaint prayed for an injunction annulling and setting aside the Commission's order of May 6, 1941. That order was issued under the following heading: *"Investigation and Suspension Docket No. 4736, Switching Charges at Decatur, Ill."* (R. 46). The order of May 6, 1941 was entered in *I. & S. Docket 4736,* and was not an order entered in *Ex Parte 104, Part II, Terminal Services,* although this latter proceeding was heard along with *I. & S. Docket No. 4736,* and was made the title of the proceeding (R. 17). The Commission itself at the end of its report of May 6, 1941 said (R. 43):

> "An order will be entered requiring cancellation of the suspended schedules. No order is necessary in the title case."

The order which the lower court set aside, therefore was an order entered in *I. & S. Docket No. 4736.* The entire record made in this proceeding was before the court. It was the only record needed by the court in considering the issues raised in appellees' complaint. However, since *Ex Parte 104, Part II, Terminal Services,* was heard along with *I. & S. Docket No. 4736,* appellees also included all parts of the record in that proceeding dealing with the Staley plant at Decatur. The record includes the

testimony offered at the hearings held in 1931 and 1932 (R. 164-241), upon which the Commission issued its report of May 22, 1936, in *A. E. Staley Mfg. Terminal Allowance,* 215 I. C. C. 656, and the testimony offered at the hearing in Chicago on June 28, 1938 (R. 242-370). These records, together with the record made in the joint proceedings of *I. & S. Docket No. 4736* and *Ex Parte 104, Part II, Terminal Services,* at the hearings held in Decatur in April 1940 (R. 370-889), constitute the complete record of the testimony submitted to the Commission respecting the terminal services at the Staley plant.

Appellees did not offer in evidence before the lower court those portions of the records in *Ex Parte 104, Part II, Terminal Services,* which dealt with the terminal services at various plants scattered throughout the country and which consisted of many thousands of pages. This evidence had nothing to do with the issues before the lower court.

It is of the greatest significance that the Commission in its report of May 6, 1941 (R. 17-46) refers to no facts that are not contained in the record submitted to the lower court. An examination of the records of the hearing held in Chicago in 1938 (R. 242-370) and in Decatur in 1940 (R. 370-889), will show that each and every statement made by the Commission in its report of May 6, 1941 was bottomed upon these two records. The Commission itself, as shown by its report, made no use of any other portions of the record in *Ex Parte 104, Part II, Terminal Services,* in arriving at its decision of May 6, 1941. Certainly the lower court, therefore, had no use for them when reviewing the Commission's report and order.

Appellants state (p. 57) that obviously the partial record considered by the lower court did not contain the evidence as to the several hundred industrial plants

which had been investigated, the evidence as to which was contained in the whole record. The Commission makes no reference in its report of May 6, 1941 to any facts dealing with the terminal services at these several hundred industrial plants or any of them which have been investigated.

Appellants refer to the decision of this Court in *Mississippi Valley Barge Line Co.* v. *United States,* 292 U. S. 282, in which this Court said (p. 286) that:

> "The Federal rule is that the findings of the Commission may not be assailed upon appeal in the absence of the evidence upon which they were made."

All the evidence upon which the findings of the Commission in this case were made was before the lower court, and that court, in order to pass upon the issues before it, required no record other than the record that the Commission itself used in writing its report and order.

## CONCLUSIONS.

Appellees do not ask this Court to determine what terminal services they are legally obligated to render under their line-haul rates at the Staley plant, at any competing plants in Decatur, or at competing plants at other points served by appellees. Appellees do not ask the Court to turn itself into an administrative tribunal. They do not ask this Court for a decree that would permanently remove the switching charge from the Staley Company. Nor do they ask for a decree that would require the imposition of a similar charge at the plants of the Staley Company's competitors.

Appellees ask that the decree of the lower court setting aside and annulling the Commission's order of May 6, 1941, be affirmed to the end that the Commission may

be in a position to reconsider the whole situation, and to carry out the duty and obligation imposed upon it of applying and enforcing not only Section 1 of the Act but Sections 2 and 3 thereof. And all this to the end that the great purposes of the Act, the removal of unjust discrimination and undue prejudice, may be accomplished, and that appellees may not be made the means by which an inequality in treatment is continued over a period of more than six years as between the Staley Company, on the one hand, and its competitors and other plants, on the other. How this equality in treatment shall be brought about is a matter for the determination of the Commission. The primary purposes of the Interstate Commerce Act remain unfulfilled until this equality has been achieved.

The Commission has had ample time and every reasonable opportunity since 1937, when a charge was first imposed against the Staley Company for the placement of cars within its plant pursuant to the Commission's findings in *A. E. Staley Mfg. Co. Terminal Allowance*, 215 I. C. C. 656, to make the necessary investigations and to determine how this equality in treatment should be brought about. It failed to do so up to the entry of the decree of the lower court, even though the matter had repeatedly been pressed upon its attention both by petitions filed by the Staley Company and by appellees in tariffs, hearings, briefs, and oral argument.

It was not until July 31, 1943, after the entry of the lower court's decree in the case at bar, that the Commission instituted an investigation respecting the switching services at plants that compete wth the Staley Company. But it did nothing towards placing the Staley Company upon an equality with its competitors pending the result of this investigation. Thus appellees have been required to leave the Staley Company "helpless in

the interval," to use the language of this Court in *United States* v. *C. M. St. P. & P. R. R. Co.*, 294 U. S. 499.

The Commission in the case at bar has not "employed the statutory standards" (*United States* v. *Carolina Carriers Corp.*, 315 U. S. 475) which Congress set up in the Interstate Commerce Act to guide and control the Commission's action. The Commission's order of May 6, 1941, does not reflect the application of the Interstate Commerce Act in a "just and reasoned manner." (*Gray* v. *Powell*, 314 U. S. 402, p. 411.)

The District Court in concluding its opinion in the case at bar said (p. 138):

> "* * * The Commission in its purpose to do justice to the carriers has inadvertently brought about such flagrant injustice to the intervening shipper as to shock the conscience of a court of equity. So far as we know, this precise question has never been before any court, but with a firm belief in the doctrine that no wrong shall exist without a remedy it seems to us that the Commission must meet the problem head on and devise some over-all method of dealing with competitive industries that will eliminate the injustice here so apparent. Otherwise, the purpose of the Act will be thwarted and the resultant inequities will outweigh the evils sought to be corrected. See *United States* v. *C. M. St. P. & P. R. R. Co.*, 294 U. S. 499."

The wrong developed by the record in this case cries for righting. Appellees respectfully submit that the decree of the lower court was right and should be affirmed.

Respectfully submitted,

LOUIS H. STRASSER,
WILLIAM B. BROWDER,
ELMER A. SMITH,
*Attorneys for Appellees.*

## APPENDIX I.

Part I, Interstate Commerce Act, Act of February 4, 1887, c. 104, 24 Stat. 379, as amended.

Section 1(5) (a) provides:

> "All charges made for any service rendered or to be rendered in the transportation of passengers or property, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful." 49 U. S. C. 1(5) (a).

Section 1(6) provides:

> "It is hereby made the duty of all common carriers subject to the provisions of this part to establish, observe, and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations, or practices are or may be made or prescribed, and just and reasonable regulations and practices affecting classifications, rates, or tariffs, the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, the carrying of personal, sample, and excess baggage, and all other matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property subject to the provisions of this part which may be necessary or proper to secure the safe and prompt receipt, handling, transportation, and delivery of property subject to the provisions of this part upon just and reasonable terms, and every unjust and unreasonable classification, regulation, and practice is prohibited and declared to be unlawful." 49 U. S. C. 1(6).

Section 2 provides:

"That if any common carrier subject to the provisions of this part shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this part, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful." 49 U. S. C. 2.

Section 3(1) provides:

"It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description." 49 U. S. C. 3(1).

Section 6(7) provides:

"No carrier, unless otherwise provided by this part, shall engage or participate in the transportation of passengers or property, as defined in this

part, unless the rates, fares and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this part; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges, which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs." 49 U. S. C. 6(7).

Section 13(2) provides in part:

"Said Commission shall, in like manner and with the same authority and powers, investigate any complaint forwarded by the railroad commissioner or railroad commission of any State or Territory at the request of such commissioner or commission, and the Interstate Commerce Commission shall have full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made, to or before said Commission by any provision of this part, or concerning which any question may arise under any of the provisions of this part, or relating to the enforcement of any of the provisions of this part. And the said Commission shall have the same powers and authority to proceed with any inquiry instituted on its own motion as though it had been appealed to by complaint or petition under any of the provisions of this part, including the power to make and enforce any order or orders in the case, or relating to the matter or thing concerning which the inquiry is had excepting orders for the payment of money. No complaint shall at any time be dismissed

because of the absence of direct damage to the complainant." 49 U. S. C. 13(2).

Section 15(1) provides:

"That whenever, after full hearing, upon a complaint made as provided in section 13 of this part, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this part for the transportation of persons or property as defined in the first section of this part, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this part, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this part, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged; and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed." 49 U. S. C. 15(1).

Section 15(13) provides:

"If the owner of property transported under this part directly or indirectly renders any service connected with such transportation, or furnishes any any instrumentality used therein, the charge and allowance therefor shall be published in tariffs or schedules filed in the manner provided in this part and shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section." 49 U. S. C. 15(13).

# APPENDIX II

| Name of Case | Citation | Location | Date Decided |
|---|---|---|---|
| **IRON AND STEEL INDUSTRIES** | | | |
| **PITTSBURGH DISTRICT** | | | |
| 1. Pittsburg Steel Co. Terminal Allowance | 209 ICC 87 ( 9th Suppl.) | Monessen, Penna. | May 14, 1935 |
| 2. Allegheny Steel Co. Terminal Allowance | 209 ICC 273 (11th Suppl.) | Brackenridge, Penna. | June 7, 1935 |
| 3. American Sheet & Tin Plate Co. Terminal Allowance (3 plants) | 209 ICC 719 (18th Suppl.) | Vandergrift, Penna.<br>Scottsdale, Penna.<br>Wellsville, Ohio | July 5, 1935 |
| 4. West Leechburg Steel Co. Terminal Allowance | 210 ICC 213 (35th Suppl.) | Leechburg, Penna. | July 29, 1935 |
| **IRON AND STEEL INDUSTRIES** | | | |
| **OUTSIDE PITTSBURGH DISTRICT** | | | |
| 1. Interlake Iron Corp. Terminal Allowance | 209 ICC 51 ( 1st Suppl.) | Toledo, Ohio | May 14, 1935 |
| 2. Sheffield Steel Corp. Terminal Allowance | 209 ICC 64 ( 4th Suppl.) | Kansas City, Mo. | May 14, 1935 |
| 3. Keystone Steel & Wire Co. Terminal Allowance | 209 ICC 82 ( 8th Suppl.) | Peoria, Illinois | May 14, 1935 |
| 4. Timken Roller Bearing Co. Terminal Allowance | 209 ICC 441 (14th Suppl.) | Canton, Ohio (2 plants) | June 24, 1935 |
| 5. Weirton Steel Co. Terminal Allowance | 209 ICC 445 (15th Suppl.) | Weirton, W. Va. | June 24, 1935 |
| 6. Inland Steel Co. Terminal Allowance | 209 ICC 747 (19th Suppl.) | Indiana Harbor, Ind. | July 11, 1935 |
| 7. Wickwire-Spencer Steel Co. Terminal Allowance | 209 ICC 751 (20th Suppl.) | Harriet, N. Y. | July 11, 1935 |
| 8. Granite City Steel Co. Terminal Allowance | 209 ICC 761 (22nd Suppl.) | Granite City and Madison, Illinois | July 11, 1935 |

| | Name of Case | Citation | Location | Date Decided |
|---|---|---|---|---|
| 9. | Great Lakes Steel Corp. Terminal Allowance | 210 ICC 103 (30th Suppl.) | Ecorse (Detroit) Mich. | July 12, 1935 |
| 10. | Interlake Iron Corp. Duluth, Minnesota, Terminal Allowance | 210 ICC 205 (33rd Suppl.) | Duluth, Minn. | July 29, 1935 |
| 11. | Wheeling Steel Corp. Terminal Allowance | 214 ICC 53 (46th Suppl.) | Benwood, W. Va.<br>Martins Ferry, Ohio<br>Steubenville, Ohio<br>Portsmouth, Ohio<br>Yorkville, Ohio<br>Wheeling, W. Va.<br>Beechbottom, W. Va. | Feb. 3, 1936 |
| 12. | William Wharton, Jr., & Co., Inc. Terminal Allowance | 215 ICC 623 (50th Suppl.) | Easton, Penna. | May 19, 1936 |
| 13. | Midvale Co. Terminal Allowance | 215 ICC 626 (51st Suppl.) | Nicetown, Penna. | May 19, 1936 |
| 14. | Acme Steel Co. Terminal Allowance | 215 ICC 373 (52nd Suppl.) | Riverdale, Ill. | Apr. 28, 1936 |
| 15. | Warren Foundry & Pipe Corp. Terminal Allowance | 215 ICC 653 (54th Suppl.) | Phillipsburg, N. J. | May 21, 1936 |
| 16. | American Steel Foundries Terminal Allowances | 216 ICC 13 (57th Suppl.) | Indiana Harbor, Ind. | May 28, 1936 |
| 17. | Republic Steel Corp. Terminal Allowance | 253 ICC 595 (66th Suppl.) | Buffalo, N. Y. | Nov. 7, 1942 |
| 18. | Hanna Furnace Corp. Terminal Allowance | 253 ICC 613 (67th Suppl.) | Buffalo, N. Y. | Nov. 11, 1942 |
| 19. | Tonawanda Iron Corp. Terminal Allowance | 255 ICC 231 (68th Suppl.) | North Tonawanda, N. Y. | Feb. 13, 1943 |
| 20. | Sharon Steel Hoop Co. Terminal Allowance | Mimeographed | Sharon, Penna. | Sept. 11, 1943 |
| 21. | Wickwire Bros. Inc. Terminal Allowance | Mimeographed | Cortland, N. Y. | Sept. 11, 1943 |
| 22. | Worth Steel Co. Terminal Allowance | Mimeographed | Claymont, Dela. | Sept. 11, 1943 |

| Name of Case | Citation | Location | Date Decided |
|---|---|---|---|
| **OIL REFINERIES** | | | |
| 1. Standard Oil Co. of Louisiana Terminal Allowance | 209 ICC 68 ( 5th Suppl.) | Baton Rouge, La. | May 14, 1935 |
| 2. Magnolia Petroleum Co. Terminal Allowance | 209 ICC 93 (10th Suppl.) | Chaison, Texas | May 14, 1935 |
| 3. Humble Oil & Refining Co. Terminal Allowance | 209 ICC 727 (13th Suppl.) | Baytown, Texas | July 8, 1935 |
| 4. Mexican Petroleum Corp. of Louisiana Terminal Allowance | 209 ICC 394 (16th Suppl.) | Destrehan, La. | June 25, 1935 |
| 5. Gulf Refining Co. Terminal Allowance | 209 ICC 756 (21st Suppl.) | Port Arthur, Texas | July 11, 1935 |
| 6. Texas Co. Terminal Allowance at Houston, Texas | 209 ICC 767 (24th Suppl.) | Houston, Texas | July 11, 1935 |
| 7. Texas Company Terminal Allowances at Port Arthur, Texas | 213 ICC 583 (44th Suppl.) | Port Arthur, Texas<br>Port Neches, Texas<br>Port Island, Texas | Jan. 15, 1936 |
| **BRIDGE AND FABRICATING COMPANIES** | | | |
| 1. Marion Steam Shovel Co. Terminal Allowance | 210 ICC 475 (41st Suppl.) | Marion, Ohio | Aug. 23 1935 |
| 2. American Bridge Co. Terminal Allowance | Mimeographed | Ambridge, Penna.<br>Pencoyd, Penna.<br>Trenton, N. J.<br>Elmira Heights, N. Y.<br>Toledo, Ohio | Sept. 11, 1943 |
| 3. McClintic-Marshall Corp. Terminal Allowance. | Mimeographed | Leetsdale, Penna. | Sept. 11, 1943 |

| Name of Case | Citation | Location | Date Decided |
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| | **LUMBER COMPANIES** | | |
| 1. Great Southern Lumber Co. Bogalusa Paper Co. Terminal allowance. | 209 ICC 793 (27th Suppl.) | Bogalusa, La. (2 plants) | July 12, 1935 |
| 2. Goodman Lumber Co. Terminal Allowance | 214 ICC 89 (45th Suppl.) | Goodman, Wis. (also includes plant of Cliffs Chemical Co.) | Feb. 8, 1936 |
| 3. Red River Lumber Co. Terminal Allowances | 234 ICC 287 (59th Suppl.) | Westwood, Calif. | July 26, 1939 |
| 4. Neils Lumber Company Terminal Allowance | 238 ICC 543 (60th Suppl.) | Libby, Montana | May 27, 1940 |
| 5. Medford Corporation Terminal Allowances | 241 ICC 407 (61st Suppl.) | Medford, Oreg. | Sept 4, 1940 |
| 6. Chiloquin Lumber Co. Terminal Allowance | 241 ICC 495 (62nd Suppl.) | Chiloquin, Oreg. | Sept. 28, 1940 |
| 7. Lamm Lumber Co. Terminal Allowances | 245 ICC 575 (63rd Suppl.) | Modoc Point, Oreg. | May 27, 1941 |
| 8. Silver Falls Timber Co. Terminal Allowances | 245 ICC 509 (64th Suppl.) | Silverton, Oreg. | May 27, 1941 |
| 9. Inland Empire Paper Company, Terminal Allowance | 246 ICC 127 (65th Suppl.) | Millwood, Wash. | July 9, 1941 |
| 10. Snoqualmie Falls Lumber Co. Terminal Allowance | 245 ICC 113 (Suppl. Report without number) | Snoqualmie, Wash. | Apr. 17, 1941 |

| Name of Case | Citation | Location | Date Decided |
|---|---|---|---|
| **MEAT PACKING COMPANIES** | | | |
| 1. John Morrell & Co. Terminal Allowance | 215 ICC 431 (48th Suppl.) | Ottumwa, Iowa | May 8, 1936 |
| 2. Kingan & Company Terminal Allowance | 255 ICC 531 (69th Suppl.) | Indianapolis, Ind. | June 2, 1943 |
| **MINING COMPANIES** | | | |
| 1. Iron Ore Mining Companies, Stock Pile Allowances | 210 ICC 254 (31st Suppl.) | Keewatin, Minn.<br>Kelly Lake, Minn. (2)<br>Nashwauk, Minn. (5)<br>Lucknow, Minn.<br>Calumet, Minn.<br>Virginia, Minn.<br>South Hibbing, Minn. | Aug. 12, 1935 |
| 2. Louisiana Development Co. Terminal Allowances | 218 ICC 276 (58th Suppl.) | Winfield, La. | Aug. 24, 1936 |
| **PAVING MATERIAL COMPANY** | | | |
| 1. Western Paving Co. Terminal Allowance | 209 ICC 770 (25th Suppl.) | Dougherty, Okla. | July 11, 1935 |
| 2. Uvalde Rock Asphalt Co. Terminal Allowance | 218 ICC 271 (47th Suppl.) | Cline, Texas<br>Blewett, Texas | Aug. 24, 1936 |
| **PLATE GLASS** | | | |
| 1. Pittsburgh Plate Glass Co. Terminal Allowance | 209 ICC 467 (17th Suppl.) | Ford City, Penna. | June 25, 1935 |
| 2. Pittsburgh Plate Glass Co. Terminal Allowance | 210 ICC 527 (43rd Suppl.) | Crystal City, Mo. | Sept. 12, 1935 |
| **PLUMBING MANUFACTURER** | | | |
| 1. Crane Company Terminal Services | 210 ICC 210 (34th Suppl.) | Chicago, Illinois | July 29, 1935 |
| **RAILROAD EQUIPMENT** | | | |
| 1. Standard Steel Car Co. Terminal Allowance | 210 ICC 296 (39th Suppl.) | Hammond, Ind. | Aug. 12, 1935 |
| 2. General American Tank Car Corp. Terminal Allowance | 210 ICC 383 (40th Suppl.) | East Chicago, Ind. | Aug. 14, 1935 |

| Name of Case | Citation | Location | Date Decided |
|---|---|---|---|
| **COKE AND BY-PRODUCTS** | | | |
| 1. Minnesota By-Products Coke Co. Terminal Allowance | 209 ICC 421 (12th Suppl.) | St. Paul, Minn. | June 24, 1935 |
| 2. St. Louis Gas & Coke Corp. Terminal Allowance | 209 ICC 797 (28th Suppl.) | Granite City, Ill. | July 12, 1935 |
| 3. Alabama By-Products Corp. Terminal Service | 210 ICC 644 (36th Suppl.) | Tarrant, North Birmingham, Alabama | Sept. 25, 1935 |
| 4. Chicago By-Products Coke Co. Terminal Allowance | 216 ICC 8 (56th Suppl.) | Chicago, Illinois | May 28, 1936 |
| **AUTO & AUTO PARTS** | | | |
| 1. Ford Motor Company, Terminal Allowance | 209 ICC 77 ( 7th Suppl.) | Detroit, Michigan | May 14, 1935 |
| 2. Studebaker Corp. Terminal Allowance | 210 ICC 137 (32nd Suppl.) | South Bend, Ind. | July 19, 1935 |
| 3. A. O. Smith Corporation, Terminal Allowance | 215 ICC 534 (53rd Suppl.) | Milwaukee, Wis. | May 19, 1936 |
| **POWER PLANTS** | | | |
| 1. Detroit Edison Company, Terminal Allowance | 209 ICC 55 ( 2nd Suppl.) | Detroit, Michigan | May 14, 1935 |
| 2. Kansas City Power & Light Company Terminal Allowance | 210 ICC 103 (29th Suppl.) | Kansas City, Mo. | July 19, 1935 |
| 3. Commonwealth Edison Co. Terminal Allowance | 215 ICC 173 (49th Suppl.) | Chicago, Ill. (5 plants in Chicago) | April 1, 1936 |
| **CEMENT PLANTS** | | | |
| 1. Universal Atlas Cement Co. Terminal Allowance | 209 ICC 61 ( 3rd Suppl.) | Steelton, Minnesota (within Duluth Switching District.) | May 14, 1935 |
| 2. Petoskey Portland Cement Co. Terminal Allowance | 210 ICC 242 (37th Suppl.) | Petoskey, Michigan | Aug. 6, 1935 |
| 3. Louisville Cement Co. Terminal Allowance | 210 ICC 293 (38th Suppl.) | Speeds, Indiana | Aug. 12, 1935 |

| Name of Case | Citation | Location | Date Decided |
|---|---|---|---|
| **CELOTEX MANUFACTURING** | | | |
| 1. Celotex Co. Terminal Allowance | 209 ICC 764 (23rd Suppl.) | Marrerro, La. | July 11, 1935 |
| **COTTON MILLS** | | | |
| 1. Pacolet Mfg. Co. Operating Allowance | 210 ICC 475 (41st Suppl.) | Pacolet, S. C. | Aug. 23, 1935 |
| **COMMERCIAL DOCK COMPANY** | | | |
| 1. East Chicago Dock Terminal Co. Terminal Allowance | 209 ICC 73 (6th Suppl.) | E. Chicago, Ill. | May 14, 1935 |
| **STORAGE & TERMINAL COMPANY** | | | |
| 1. Detroit Harbor Terminals, Inc. Terminal Allowance | 209 ICC 787 (26th Suppl.) | Detroit, Michigan | July 13, 1935 |
| **GRAIN PRODUCTS** | | | |
| 1. A. E. Staley Mfg. Co. Terminal Allowance | 215 ICC 656 (55th Suppl.) | Decatur, Illinois | May 22, 1936 |